APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-6386

WILLIAM JAMES RUMMEL,
Petitioner,

v.

W. J. ESTELLE, JR., DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,
Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 19, 1979
CERTIORARI GRANTED MAY 21, 1979

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Jan. 31, 1973—Indictment issued by the Grand Jury of Bexar County, Texas.

Apr. 9, 1973—Jury trial of action commenced in the 187th State District Court of Bexar County, Texas.

Apr. 10, 1973—Court's charge to the jury, and verdict of the jury in favor of the State.

Apr. 26, 1973—Judgment entered sentencing petitioner to life imprisonment.

May 22, 1974—Opinion filed of the Texas Court of Criminal Appeals affirming petitioner's conviction.

Mar. 4, 1975—Petitioner's application for writ of habeas corpus filed in the 187th State District Court of Bexar County, Texas.

July 25, 1975—Order entered denying petitioner's application for writ of habeas corpus.

Sept. 23, 1975—Action by the Texas Court of Criminal Appeals denying without written order petitioner's application for writ of habeas corpus.

Jan. 9, 1976—Petitioner's petition for writ of habeas corpus filed in the U.S. District Court for the Western District of Texas, San Antonio Division.

May 13, 1976—Order entered denying petitioner's petition for writ of habeas corpus.

May 17, 1976—Judgment entered denying petitioner's petition for writ of habeas corpus.

June 2, 1976—Petitioner's motion for reconsideration filed.

July 14, 1976—Order entered denying petitioner's motion for reconsideration, and petitioner's notice of appeal filed.

Mar. 6, 1978—Opinion and judgment filed by the U.S. Court of Appeals for the Fifth Circuit in favor of petitioner.

Apr. 21, 1978—Rehearing en banc granted by the Court of Appeals.

Dec. 20, 1978—Opinion filed and judgment entered by the Court of Appeals en banc in favor of the State.

Jan. 3, 1979—Petitioner's petition for rehearing filed.

Mar. 9, 1979—Order entered denying petitioner's petition for rehearing.

Mar. 19, 1979—Judgment issued in favor of the State.

OFF-BOND AFFIDAVIT
$2500.00 Bond

Alias WARRANT OF ARREST

No. 53951

JUSTICE'S COURT PRECINCT NO. 1

Bexar County, Texas

THE STATE OF TEXAS

vs. FEB 6 1973

WILLIAM J. RUMMEL

In Bexar County Jail on other charges

Came to hand the 30 day of Jan 19 73

and executed on the 30 day of Jan

19 73 by

Executed the within named [illegible]
[illegible]
in Bexar Co. Jail.

W. B. "BILL" HAUCK, Sheriff
JOE FERRO, Constable, Precinct 1
Bexar County, Texas

By C.M. [illegible], Deputy

FILING: [illegible]

MIKE HERNANDEZ, JR.
Justice of the Peace, Prect. No. 1
Bexar County, Texas

IN THE JUSTICE COURT PRECINCT NO. ONE
BEXAR COUNTY, TEXAS

MOTION OF SURETY TO SURRENDER DEFENDANT

No. 53951

THE STATE OF TEXAS

vs.

WILLIAM J. RUMMEL

Before me, the undersigned authority, on this day personally appeared James H. Hance, who, being by me duly sworn, deposes and says on his oath that he is one of the sureties on the appearance bond of said defendant, charged with the Felony Offense of Theft over $50.00 which said cause is pending in this Court and numbered: 53951 on the Docket of this Court, and the said surety further states on his oath that he desires to surrender the said defendant into the custody of the Sheriff of Bexar County, Texas. Said surety further states on his oath that he has just cause to surrender said defendant, said cause being as follows: Defendant is in Bexar Co. Jail on other charges, Swindling by check, etc.

WHEREFORE, premises considered, petitioner prays that Court that an Alias Warrant issue addressed to the Sheriff of Bexar County, Texas, directing the said Sheriff to place the said defendant in Jail.

/s/ James H. Hance

Sworn and subscribed before me, this the 30th day of January, A.D. 1973

(seal)

/s/ Arturo Martinez
Notary Public in and for Bexar County, Texas

MOTION GRANTED AS PRAYED FOR AND AN ALIAS WARRANT ORDERED ISSUED.

/s/ Mike Hernandez, Jr.
Justice of the Peace, Precinct No. 1, Bexar County, Texas

DEFENDANT'S NOTICE OF APPEAL

HONORABLE JOHN BENAVIDES
187TH DISTRICT COURT
BEXAR COUNTY, TEXAS

SIR,

THIS IS MY OFFICIAL NOTICE OF APPEAL IN THE INSTANCE OF CAUSE # *UNKNOWN,* THEFT 0/50 UNDER FALSE PRETEXT, OF WHICH I WAS CONVICTED AND SENTENCED IN YOUR COURT THE 10TH DAY OF APRIL, 1973.

AND IN THE INSTANCE OF CAUSE # *UNKNOWN* SWINDLING BY WORTHLESS CHECK 0/50 OF WHICH I WAS CONVICTED AND SENTENCED IN YOUR COURT THE 10TH APRIL 1973.

William J. Rummel
WILLIAM J. RUMMEL
BEXAR COUNTY JAIL

FILING:
FILED
APR. 16, 1973
ELTON R. CUDE
Clerk of the District Courts
Bexar County, Texas
By: A. E. Ozuna,
Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL	
vs.	SA-76-CA-20
W. J. ESTELLE, JR., Director Texas Department of Corrections	

ORDER DENYING PETITION FOR HABEAS CORPUS RELIEF—Filed May 14, 1976

Petitioner, William James Rummel, was convicted in the 187th District Court of Bexar County, Texas, after his plea of not guilty upon the charges of theft of property over the value of $50.00 by false pretext. Two prior convictions were proven in his record, and he was sentenced to life imprisonment. Upon appeal, Petitioner's conviction was affirmed by the Texas Court of Criminal Appeals. *See Rummel v. State,* 509 S.W.2d 630.

In the present Petition the Petitioner raises the following points of alleged error by the trial court:

(1) Ineffective counsel, and
(2) Harsh, cruel, and unusual punishment.

Neither of these points were raised upon appeal, but each was raised in a petition for habeas corpus in the trial court. In this connection, the trial judge filed findings of fact and conclusions of law, and found that the application was without merit and should be denied. Texas Court of Criminal Appeals followed this recommendation and denied the Petitioner's application without written order. Therefore, the Court finds that the Petitioner has exhausted his State court remedies pursuant to provisions of 28 U.S.C. § 2254(b).

After reviewing the record in the present case together with the transcript of State court proceedings, the Court finds that upon a showing of indigency the Petitioner was first appointed Mr. William B. Chenault, III, as counsel one month before his trial. Thereafter, on the day of trial, the Petitioner was appointed a second attorney at his own request, who was directed to assist his first appointed

counsel. The Petitioner complains that Mr. Chenault made no pretrial motions, no independent investigation of his case, did not know the names of the State's witnesses, and failed to call any witnesses on the Petitioner's behalf. Petitioner was released on bail some two weeks after his arrest and at least four months before Chenault was appointed to represent him. The Petitioner admitted knowing none of the names of the witnesses whom he contends that his attorney, Mr. Chenault, should have called to testify on his behalf, except for the complaining witness, Shaw. Chenault's co-counsel obtained an instrument from Mr. Shaw entitled "Release and Non-prosecution Statement." The instrument had first been the subject of a Motion in Limine by the State at the commencement of the trial, which Motion was granted and Chenault was instructed not to attempt to introduce it. Nevertheless, prior to the hearing on punishment at the conclusion of the trial, Chenault sought permission to offer it in evidence, but such permission was denied. As observed by the Appellate Court, Shaw's testimony was factual and expressed no opinion concerning the appellant's guilt, and the instrument was not admissible for impeachment purposes. Shaw's prior testimony given to the attorneys was not inconsistent with any material testimony he gave at the trial. As to the Petitioner's complaint that other "witnesses" were not called and that Mr. Chenault did not know their names, but knew where they worked, the Court finds that the Petitioner was at liberty on bail for many months before his attorneys ever had the opportunity to look into the matter of possible helpful evidence, and evidently made no effort to do so.

Although the trial judge held no evidentiary hearing, he prepared a remarkably detailed set of findings and conclusions which appear in the transcript. It shows that among other things, Mr. Chenault obtained a continuance on the Petitioner's behalf, discussed the case with Petitioner at the jail on at least three occasions, examined the State's file, communicated with the Petitioner's parents by telephone and letter, intensively cross-examined witnesses of the State, moved for an instructed verdict, objected to the Court's charge and submitted requested instructions, one of which was granted by the Court, and attempted to

impeach the complaining witness by introduction of the above mentioned instrument.

In the Petitioner's traverse, he cites the Fifth Circuit case of *MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960), which is the landmark case within the Fifth Circuit on the standard for effective counsel. In *MacKenna,* the Fifth Circuit stated that the right to effective counsel means not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. *Id.* at 599. Reviewing the transcript of State court proceedings in this case in light of the Fifth Circuit's standard in *MacKenna,* the Court finds that Petitioner's first contention is without merit.

The second and final point raised by the Petitioner, namely, that he was subjected to cruel and unusual punishment in violation of the Constitution, by reason of the jury's verdict of life imprisonment based upon the enhancement statute, is also without merit. It has been held that the Texas enhancement statute is Constitutional. *See Spencer v. Texas,* 385 U.S. 551 (1967). The Fifth Circuit has also followed the *Spencer* decision. Further, the argument advanced by the Respondent to the effect that a "life sentence" is nothing of the sort because State Parole law in regulation entitle a convict to release on parole after he has served approximately twelve years, and even less if such prisoner is made a trusty, effectively answers any attack on this sentence as being cruel and unusual punishment forbidden by the Constitution. The Court finds Petitioner's second contention to also be without merit.

Therefore, for the reasons and authorities cited above, the Court finds that an evidentiary hearing is not warranted in this case, and that the Petitioner's application for habeas corpus relief should be and the same is hereby DENIED.

SO ORDERED this the 13th day of May, 1976.

/s/ D. W. Suttle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL vs. W. J. ESTELLE, JR., Director, Texas Department of Corrections	SA-76-CA-20

JUDGMENT—Filed May 17, 1976

This action came on for consideration before the Court, Honorable D. W. Suttle, United States District Judge, and the issues having been duly considered and the Court having rendered a decision on May 14, 1976, denying Petitioner's application for habeas corpus relief,

It is, therefore, ORDERED AND ADJUDGED that the petition for writ of habeas corpus is denied and this cause is terminated.

DATED at San Antonio, Texas, this 17th day of May, 1976.

DAN W. BENEDICT, CLERK
UNITED STATES DISTRICT COURT

By: Carolyn L. Wright
Deputy U. S. District Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

WILLIAM JAMES RUMMEL vs. W. J. ESTELLE, JR., Director Texas Department of Corrections	SA-76-CA-20

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION—Filed July 14, 1976

After reviewing the file in the present case, together with the Petitioner's Motion for Reconsideration filed June 2, 1976, the Court finds no new arguments or authorities not previously raised by the Petitioner and considered by the Court that would warrant the reconsideration and reversal of the Court's decision rendered May 14, 1976, denying the Petitioner's application for habeas corpus relief. The Petitioner's Motion for Reconsideration is, according, DENIED.

SO ORDERED this the *14th* day of July, 1976.

/s/ D. W. Suttle
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT

William James Rummel,
Petitioner-Appellant,
v.
W. J. Estelle, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 76-2946.

March 6, 1978.

Rehearing Granted April 21, 1978.

William James Rummel, pro se.

Scott J. Atlas, Houston, Tex. (court-appointed), for petitioner-appellant.

John L. Hill, Atty. Gen., Dunklin Sullivan, Asst. Atty. Gen., David M. Kendall, Jr., 1st Asst. Atty. Gen., Joe B. Dibrell, Gilbert J. Pena, Asst. Attys. Gen., Austin, Tex., for respondent-appellee.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GOLDBERG, and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Petitioner William James Rummel appeals the district court's denial of habeas corpus relief from state confinement. He complains that the enhanced sentence he received constituted cruel and unusual punishment in violation of the eighth amendment and that his court-appointed attorney rendered ineffective assistance of counsel in violation of his sixth amendment rights. Because we hold that Rummel's life sentence is so grossly disproportionate to his crimes that it violates the Cruel and Unusual Punishments

Clause, we do not reach the question whether Rummel's trial counsel rendered adequate assistance.

In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining $120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: In 1964 he presented a credit card with the intent to defraud of approximately $80, and in 1969 he passed a forged instrument with a face value of $28.36. Rummel pled not guilty to the false pretense indictment, but a jury found him guilty as charged. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925).[1] On appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Rummel v. State*, 509 S.W.2d 630 (Tex.Cr.App.1974). Rummel applied for post-conviction relief and raised in the Texas courts the issues now before us, but his application was denied without a hearing. Then Rummel sought habeas corpus relief in the federal district court, which also denied his petition without a hearing.

Article 63 requires the trial court to sentence a defendant to life imprisonment upon a third conviction for any felony, without consideration of any lesser penalty. On its face, this statute does not violate the eighth amendment. *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). Rummel does not maintain that Article 63 as written violates the eighth amendment, but that Texas could not apply its inflexible life imprisonment stricture of Article 63 to him because it abridged his protection against cruel and unusual punishment.[2]

In addition to limiting the kinds of punishment that a state may impose and placing substantive limits on what a state may declare criminal and punish as such, the Cruel and Unusual Punishments Clause proscribes amounts of

[1] Article 63 provides:

> Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

With slight rewording, the new Texas Penal Code preserves the provisions of Article 63, now codified as Tex. Penal Code Ann. § 12.42(d) (Vernon 1974).

[2] A state may apply a concededly valid statute in a particular case in such a way as to violate provisions of the Constitution. *Edwards v. South Carolina*, 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697 (1963); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886).

punishment which are grossly disproportionate to the severity of the crime. *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 1410, 51 L.Ed.2d 711, 742 (1977). While the Supreme Court has yet to hold a sentence cruel and unusual for length alone, its reasoning never has suggested that a disproportionately long prison sentence would be immune from eighth amendment challenge.[3] In *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1909), the Court held that a provision of the Philippine Code of Criminal Procedure allowing the imposition of a 15-year sentence to hard and painful labor in chains for a false entry on an official report violated the eighth amendment. The Court found the Code's minimum penalty of 12 years amazing in light of the American commonwealths' "precept of justice that punishment for crime should be graduated and proportioned to offense." 217 U.S. at 367, 30 S.Ct. at 549, 54 L.Ed. at 798. Subsequently, in *Trop v. Dulles*, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 630 (1957), the Court overturned denationalization as a punishment for desertion from the military. An opinion by Chief Justice Warren, joined by three other members of the Court, put aside the death penalty as the index of the constitutional limit on punishment in these words:

> [T]he existence of the death penalty [as punishment acceptable under the Constitution] is not a license to the Government to devise any punishment short of death within the limit of its imagination.

356 U.S. at 99, 78 S.Ct. at 597, 2 L.Ed.2d at 641. Justice Brennan, concurring, also judged the constitutionality of the punishment by its proportion to the crime:

> [T]he severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment.

356 U.S. at 111, 78 S.Ct. at 603, 2 L.Ed.2d at 648.

Recently, in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court amplified the proportionality component of the eighth amendment by holding that a punishment clearly permissible for some

[3] *But cf. Ingraham v. Wright*, 430 U.S. 651, 670 n. 39, 97 S.Ct. 1401, 1412 n. 39, 51 L.Ed.2d 711, 730 n. 39 (1977).

crimes is constitutionally disproportionate for others. In *Coker*, the plurality opinion by Justice White, and Justice Powell's opinion concurring in the judgment of the Court, stressed disproportionality in holding that Georgia may not execute a defendant for rape. Both of these opinions emphasized that to the maximum possible extent, objective factors must inform the decision whether a particular punishment violates the eighth amendment. The Chief Justice's dissent challenged not the disproportionality approach, but the conclusion that death was in fact an excessive penalty for the crime of rape. Thus, *Coker* heralds a more exacting weighing of the relationship of the punishment to the crime, governed by objective factors.

Coker involved capital punishment, but that is not the only sentence which can be disproportionate. A sentence to imprisonment for life is surely not so lenient as to be unquestionably proportional under the eighth amendment wherever a state might impose it. Texas points out that a life sentence under its law amounts to less than a life sentence because a prisoner becomes eligible for parole after serving 20 years. With good conduct credit, eligibility accrues in 12 years; and with trusty status, in ten years. Texas argues that we should view its recidivist statute as a requirement that a defendant with two or more prior felonies prove himself within the prison system to achieve early release. Therefore, since a well-behaved prisoner could receive a term not grossly disproportionate for one committing a third offense, Texas argues that this court should not equate Rummel's sentence with one for actual incarceration for life.

The grant or denial of parole by a state, in the absence of some unusual circumstance, is not reviewable in federal court. If Rummel has a constitutional right not to be committed to prison for the remainder of his life to punish his offenses, then Texas may not deprive him of that right by suggesting it may be willing to interdict its denial by the future exercise of discretion which we have characterized as a matter of administrative grace.[4] Indeed, if the proportionality of Rummel's sentence and hence its constitutionality depended upon the availability of parole, we would have to make a careful review of procedures and evidence in state parole proceedings, since the availability of parole in fact and the accuracy of individual parole decisions then would measure constitutional dimensions.

In most jurisdictions, a sentence to imprisonment for life now stands in the place where the death penalty stood earlier in this century—the ultimate punishment imposed by this society for those crimes most abhorrent to it. Therefore, the question of the proportionality of Rummel's life sentence to the crime of which he was convicted deserves a consideration which may be unnecessary for a lesser sentence.[5]

Rummel draws support for his eighth amendment claim from *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), *cert. denied*, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974). In *Hart* the Fourth Circuit held that a sentence imposed under a West Virginia recidivist statute was cruel and unusual based on length alone because it was grossly disproportionate to the crimes involved. The state court enhanced Hart's punishment for committing perjury at his son's murder trial to life imprisonment on the basis of a 1949 conviction for writing a $50 check on insufficient funds and a 1955 conviction of interstate transportation of forged checks worth $140. In determining that the West Virginia statute violated the eighth amendment as applied to Hart, the Fourth Circuit considered cumulatively (1) the nature of the offense, (2) the legislative purposes behind the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction.

The analysis in *Hart* is not inconsistent with our prior applications of the Cruel and Unusual Punishments Clause. We have held that a punishment violates the eighth amendment only if it "is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the

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[4] *Brown v. Kearney*, 355 F.2d 199 (5th Cir. 1966). *See also Johnson v. Wells*, 566 F.2d 1016 (5th Cir. 1978).

It is no answer to suggest that the sentence imposed may never be carried out in fact, because the threat itself makes the punishment obnoxious. *Trop v. Dulles*, 356 U.S. at 102, 78 S.Ct. at 599, 2 L.Ed.2d at 643 (Opinion of Warren, C. J.). We distinguish the case at bar from cases in which we upheld prison terms of lengths far in excess of a natural life span, *e.g.*, *Yeager v. Estelle*, 489 F.2d 276 (5th Cir. 1973), *cert. denied*, 416 U.S. 908, 92 S.Ct. 1616, 40 L.Ed.2d 113 (1974). In those cases, natural law and not administrative grace invariably prohibited the state from carrying out any punishment greater than life imprisonment.

[5] *Cf. Hall v. McKenzie*, 537 F.2d 1232, 1235-36 (4th Cir. 1976); *Wood v. South Carolina*, 483 F.2d 149 (4th Cir. 1973).

sense of justice." *Rogers v. United States,* 304 F.2d 520, 521 (5th Cir. 1962). But we have never set forth in detail those factors which determine whether this standard has been met where the nature of the offense alone does not confirm the proportionality of the punishment. Some decisions of this circuit have cited *Hart* approvingly.[6] However, because each of these cases involved at least one offense presenting a potential for violence, a strong social interest, or a sentence less severe than life, we upheld the sentence imposed without considering any part of the *Hart* analysis other than its initial inquiry into the nature of the crime.

The factors set forth in *Hart* have been central to the Supreme Court's major decisions applying the Cruel and Unusual Punishments Clause, although the Court has not applied them as systematically as did the Fourth Circuit. The nature of the crime figures prominently in *Coker v. Georgia,* 433 U.S. at 598–601, 97 S.Ct. at 2869–70, 53 L.Ed. 2d at 993–994 (Opinion of White, J.); *id.* at 602, 97 S.Ct. at 2871, 53 L.Ed.2d at 996 (Opinion of Powell, J.); and *Weems v. United States,* 217 U.S. at 365–66, 30 S.Ct. at 548, 54 L.Ed. at 797–798. *See also Trop v. Dulles,* 356 U.S. at 92–93, 78 S.Ct. at 593–94, 2 L.Ed.2d at 637–638 (Opinion of Warren, C. J.). *Weems* took the object of the Philippine statute into account in determining that the sentence to painful labor in chains violated the eighth amendment. 217 U.S. at 363, 381, 30 S.Ct. at 547, 554–55, 54 L.Ed. at 804. In *Trop,* both the plurality opinion by Chief Justice Warren and Justice Brennan's concurrence considered the relation between the objectives of Congress and the penalty of denationalization. 356 U.S. at 96–98, 78 S.Ct. at 595–96, 2 L.Ed.2d at 639–641 (Opinion of Warren, C. J.); *id.* at 107–10, 78 S.Ct. at 601–03, 2 L.Ed.2d at 646–648 (Opinion of Brennan, J.). Recent cases also confirm the need to discern the legislative objective and to avoid displacing legislative discretion with judicial discretion. *See, e. g., Gregg v. Georgia,* 428 U.S. 153, 181–182, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879–880 (1976) (Opinion of Stewart, J.), *citing Furman v. Georgia,* 408 U.S. 238, 451, 92 S.Ct. 2726, 2834, 33 L.Ed.2d 346, 472 (1972) (Powell, J., dissenting). Comparisons of challenged

[6] *Capuchino v. Estelle,* 506 F.2d 440 (5th Cir. 1975), *cert. denied,* 423 U.S. 842, 96 S.Ct. 75, 46 L.Ed.2d 62 (1975); *Yeager v. Estelle,* 489 F.2d 276 (5th Cir. 1973), *cert. denied,* 416 U.S. 908, 92 S.Ct. 1616, 40 L.Ed.2d 113 (1974). *Browne v. Estelle,* 544 F.2d 1244 (5th Cir. 1977), cited *Hart* approvingly but dismissed because the issue was not properly presented as a class action.

punishments with punishments meted out in the same jurisdiction or other jurisdiction have also guided the Supreme Court in its major eighth amendment cases.[7] Because *Hart* applies objective criteria solidly grounded in decisions of the Supreme Court, we hold that its form of analysis properly guides our decision.

In considering the constitutionality of Rummel's sentence, we look first to the nature of the crimes for which he was convicted. Our prior cases found this factor alone determinative where one or more offenses forming the basis for the sentence involved violence, a potential for violence, or a strong social interest. In *Yeager v. Estelle,* 489 F.2d 276 (5th Cir. 1973), *cert. denied,* 416 U.S. 908, 92 S.Ct. 1616, 40 L.Ed.2d 113 (1974), *citing Hart v. Coiner,* 483 F.2d 136, 139–40 (4th Cir. 1973), we upheld petitioner's 500-year prison term without proceeding to other points of the *Hart* analysis where the petitioner had been convicted of murder with malice. *Capuchino v. Estelle,* 506 F.2d 440 (5th Cir. 1975), *cert. denied,* 423 U.S. 842, 96 S.Ct. 75, 46 L.Ed.2d 62 (1975), upheld a life sentence under the Texas recidivist statute where the state meted out a life sentence to a defendant convicted of one crime involving violence (assault with intent to murder), one involving a potential for violence (burglary), and one implicating a particularly strong social interest (possession of narcotics paraphernalia). Similarly, in *King v. United States,* 565 F.2d 356 (1978), we examined only the nature of the offense in upholding a 15-year sentence for conspiracy to import heroin imposed consecutively with a 10-year sentence previously imposed for the substantive offense.[8]

[7] *See, e.g. Coker v. Georgia,* 433 U.S. at 592–595, 97 S.Ct. at 2866–67, 53 L.Ed.2d at 990–991 (Opinion of White, J.); *id.* at 602, 97 S.Ct. at 2871, 53 L.Ed.2d at 996 (Opinion of Powell, J.) (comparing various states as to modifications to death penalty statutes after *Furman*); *Gregg v. Georgia,* 428 U.S. at 179, 96 S.Ct. at 2928, 49 L.Ed.2d at 878 (Opinion of Stewart, J.); *Weems v. United States,* 217 U.S. at 367–77, 380, 30 S.Ct. at 549–53, 554, 54 L.Ed. at 798–803, 804 (comparing challenged statute with state punishments, penalties available under federal law, and other penalties for more serious crimes in the same jurisdiction). *See also Trop v. Dulles,* 356 U.S. at 102–03, 78 S.Ct. at 599, 2 L.Ed. at 643 (Opinion of Warren, C. J.) (examining denationalization penalties imposed by other nations).

[8] The Circuit which decided *Hart* has taken a similarly restrictive view of the sorts of crimes for which a life sentence can give rise to more than a frivolous claim of constitutional disproportionality. *Griffin v. Warden,* 517 F.2d 756,

None of Rummel's offenses present exacerbating factors justifying the severe penalty. Considered in combination, Rummel's offenses, although felonies under Texas law, lack those indicia of depravity generally associated with felonies and the heinousness of the offenses for which life imprisonment is a common punishment. They were substantially separated in time. None involved violence or the potential of violence. Each was solely a property crime and the amounts taken were not substantial.

Second, we consider the legislative objective in making the conduct a punishable offense. Here the inquiry seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted. *Hart, supra,* 483 F.2d at 141. The Supreme Court has recognized the tension between an inquiry into legislative purpose and the need for federal courts to avoid substituting their discretionary judgment for that of the states. *Gregg v. Georgia,* 428 U.S. at 181–182, 96 S.Ct. at 2929, 49 L.Ed.2d at 879–880 (Opinion of Stewart, J.). In *Weems,* however, the Court showed less deference to the legislative judgment where "the law in controversy seems to be independent of degrees." 217 U.S. at 365, 30 S.Ct. at 548, 54 L,Ed. at 797. This latter conditon is present in the case at bar. Article 63 indiscriminately punishes such a broad range of offenses with a mandatory life sentence that we can discern no clear legislative judgment that Texas

757 (4th Cir. 1975), upheld a life sentence for a defendant convicted of grand larceny, burglary, and breaking and entering because these offenses "clearly involve the potentiality of violence and danger to life as well as property." *Hall v. McKenzie,* 537 F.2d 1232 (4th Cir. 1976), upheld a 10 to 20-year sentence imposed upon a defendant in his early twenties convicted of the nonforcible rape of a thirteen year old female in part because the offense was a crime against the person.

Courts applying *Hart* have overturned few sentences. *Davis v. Zahradnick,* 432 F.Supp. 444 (W.D.Va. 1977), struck down two twenty-year consecutive sentences for one count of possession of marijuana with intent to distribute and one count of distribution where less than nine ounces was involved. The Sixth Circuit followed *Hart* in striking down 30- to 60-year sentences imposed upon first offenders for the same two offenses under Ohio law. *Downey v. Perini,* 518 F.2d 1288 (6th Cir. 1975), *vacated on other grounds,* 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975). *Roberts v. Collins,* 544 F.2d 168 (4th Cir. 1976), cited *Hart* in holding that the eighth amendment prohibits a state from imposing a greater sentence for a lesser included offense than it could impose for the comprehensive crime. *See also United States v. Neary,* 552 F.2d 1184, 1195 (7th Cir. 1977).

could achieve its penological objectives only by imposing a life sentence on one such as Rummel.

The Texas recidivist statute aims at protecting citizens from incorrigible repeat offenders. While Rummel's offenses merit punishment, not only individually but also because of their cumulative impact, they hardly suggest that he presents such a threat to society as to call forth its harshest penalty short of death. Whether a particular punishment is grossly disproportionate to a rational penological objective is best answered by the last points of the *Hart* analysis, which compare the punishment imposed with available penalties for other offenses and with penalties in other jurisdictions.

A comparison of Rummel's sentence with the punishment accorded other crimes under Texas law further highlights the irrational severity of the life sentence mandated by Article 63. Because the trial court sentenced Rummel under a repeated offender statute, we consider Rummel's offenses together to determine whether the mandatory life sentence imposed upon him by the statute is proportionate to the combined offenses as compared with similar punishments inflicted under Texas law. *Hart v. Coiner,* 483 F.2d at 142. Apart from its habitual criminal statute, Texas imposes a mandatory life sentence (or death) only for the crime of capital murder: murdering a policeman, fireman, or prison employee, murdering for pay or while escaping from prison, or while committing kidnapping, burglary, robbery, aggravated rape, or arson.[9] The trial court could have imposed a sentence for as little as five years if Rummel had committed a single first-degree felony, such as murder, aggravated rape, or arson.[10] The same five-year minimum would have applied if Rummel had committed a second-degree felony with a prior conviction for another: for example, aggravated kidnapping with a prior conviction for rape or voluntary manslaughter with a prior conviction for burglary. With a single conviction for a second-degree

[9] Tex. Penal Code Ann. § 19.03 (Vernon 1974) defines capital murder. *Id.* § 12.31 sets the punishment at life imprisonment or death.

[10] Tex. Penal Code Ann. § 12.32 (Vernon 1974) punishes first-degree felonies with a prison sentence of 5 to 99 years. Murder, *id.* § 19.02, aggravated rape, *id.* § 21.03, and arson, *id.* § 28.02, are among the crimes treated as first-degree felonies.

felony, the trial court could impose a term no longer than 20 years and as short as two years.[11]

Compared with those statutory punishments for violent felonies for which Texas does not bind the trial court's hand in granting leniency, the punishment indiscriminately imposed on Rummel is too harsh. In combination, Rummel's deceitful acts deprived his victims of approximately $230. The record suggests that no harmful consequences beyond the loss of the money itself flowed from his offenses. Intervening action by the Texas legislature underscores the relatively trivial nature of Rummel's third offense, because Texas law now treats a first offense of theft by false pretext only as a misdemeanor.[12]

Comparing Rummel's sentence with the sentence imposed in other jurisdictions for similar offenses, confirms the gross disproportionality between his crime and his sentence.[13] At the time Rummel was convicted several states had statutes allowing the sentencing court to impose a life sentence upon a third f lony conviction for crimes such as his. However, only Indiana and Washington made the life sentence mandatory upon the third conviction for any felony. Indiana has since modified its statute [14] and a

[11] Aggravated kidnapping, Tex. Penal Code Ann. § 20.04 (Vernon 1974), rape, *id.* § 21.03, voluntary manslaughter, *id.* § 19.04, and burglary, *id.* § 30.02(a)-(c) are second-degree felonies, punishable under *id.* § 12.33 for a prison term of from 2 to 20 years. Under *id.* § 12.42(b), a defendant convicted of his second felony in the second degree is punished as a first-degree felon, thereby requiring a 5-year minimum sentence under *id.* § 12.32.

[12] Under the new Texas Penal Code, theft of $120 by false pretext constitutes a Class A misdemeanor. Tex. Penal Code Ann. § 31.03(b)(1) & (d)(3) (Vernon 1974 & 1977 Supp.). A Class A misdemeanor carries a maximum jail term of one year, *id.* § 12.21. This legislative change suggests that Rummel's offense ranked low in the hierarchy of felonies under Texas law, although standing alone it has little persuasive value. *Capuchino v. Estelle*, 506 F.2d at 442.

[13] This is not a search for a norm or a demand for conformity in these diverse jurisdictions. Some states might validly impose an uncustomarily harsh sentence for an offense not regarded so seriously in others where it has a larger interest in controlling that deviation. It also may impose a stiffer penalty where an offense, non-serious in itself, forms part of a pattern of conduct which is a particular problem for that state. Crimes involving dangerous drugs may fall in this category. None of Rummel's offenses presents such an interest.

[14] Under Indiana's new statute, the sentencing court adds a 30-year additional term to the maximum sentence imposed upon a third-time felon. Ind. Code Ann. § 35-50-2-8 (Burns 1977 Supp.). West Virginia's recidivist statute remains on the books, but *Hart* limits its application. W.Va. Code § 61-11-18. Although most states impose higher penalties upon third-time felons than upon first-offenders, no other states have determined that all third-time felony offenders must receive a sentence of life in prison. State statutes for the most part employ one or more of the following techniques in determining the additional penalty: (1) punishment is keyed to the grade of the third offense by increasing the minimum punishment or by making the punishment the mandatory maximum, a multiple of the maximum or the maximum plus a fixed term of years; (2) a lengthy sentence is allowed, but its imposition in a particular case is left to the discretion of the sentencing court; (3) a relatively small mandatory minimum is applied to all third-time felons, with greater mandatory punishments available for fourth offenses; (4) severe penalties are required but only for listed violent felonies.

In addition to Indiana, Washington, and West Virginia, the following state statutes appear to require the strictest mandatory punishment for one in Rummel's situation: N.C. Gen. Stat. §§ 14-7.1, -7.6 (20-year minimum); Okla. Stat. Ann. tit. 21, § 51 (West) (20 years plus maximum for third offense). Several states provide for a ten-year minimum for a third offense and a few provide for a mandatory life sentence for a fourth felony conviction.

decision by the Supreme Court of Washington makes it questionable whether a mandatory life sentence could have been imposed upon one in Rummel's situation.[15] Thus, the state of Texas now stands virtually alone in its unqualified demand for life imprisonment for a three-time felon even where his convictions were for minor property crimes involving neither violence nor a remote possibility of violence.

Our assessment of Rummel's sentence in light of the *Hart* factors leads us to conclude that imposing a life sentence for these three crimes is so grossly disproportionate to the offenses as to constitute cruel and unusual punishment in violation of the eighth amendment. Rummel's offenses involved no special factor sufficient to call forth so severe a sentence. The legislative objective of punishing recidivists certainly is legitimate. However, in view of the dramatically lower minimum penalties that Texas imposes upon defendants who commit even the most violent crimes short of capital murder and even upon defendants with a second conviction and a prior offense involving violent second-degree felonies, it clearly appears that a significantly less severe penalty would fulfill the legislative objectives of protecting citizens and deterring crime. The recent reclassification of Rummel's third offense as a misdemeanor under Texas law buttresses this view. That at most two other states and perhaps none would require life imprisonment for a defendant in Rummel's circumstances confirms the constitutional disproportionality of the sentence given Rummel.

[15] In *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236, 240 n. 4 (1977), the Supreme Court of Washington agreed that the sentence in *Hart* was disproportionate, although it found Lee's sentence within constitutional bounds.

Rummel maintains that a finding that the Texas habitual criminal statute violates the eighth amendment requires his immediate release. He points out that because a jury sentenced him, Texas law requires a trial de novo in which he may elect to be tried under the new Texas Penal Code, which classifies his third offense as a misdemeanor. Even if he were to receive the maximum sentence as a repeat misdemeanant, he would have served his sentence already. We do not pass upon this theory, but leave the question for the courts of Texas to decide.

We add an important caveat to our holding that the Texas habitual criminal statute, as applied to Rummel in this instance, violates the eighth amendment. Today's precedent signals no beginning for appellate review of judicial sentencing discretion. We expressly recognize both that the prerogative to fix sentence ranges for proscribed criminal conduct belongs to the legislative and not the judicial branch and that it is extremely broad. We hold only that it is not unbounded. We overturn this nondiscretionary judicial action in applying an inflexible legislative edict because it can be objectively demonstrated to be grossly disproportionate to any rational penological objective to be served in this particular case.

The decision of the district court is reversed with directions to grant a writ of habeas corpus for the release of Rummel, unless within 60 days the state of Texas shall resentence him to punishment according to Texas law but not inconsistent with this opinion.

REVERSED and REMANDED with directions.

THORNBERRY, Circuit Judge, dissenting:

With deference, I must dissent.

Perhaps, if I were the prosecutor, I would not have sought an indictment charging the defendant with an habitual count; if I were a state lawmaker I would vote to amend the statute so that it would not be applied as has been done here; or if I were governor of the State of Texas, I would consider the petitioner a prime candidate for clemency. But I do not hold these offices and my decision must be guided by the eighth amendment rather than my feelings of compassion and justice. In that amendment, I find nothing that compels the result reached by the majority.

The majority accepts Rummel's argument that a life

sentence is so grossly disproportionate to the crimes he committed that it cannot withstand an eighth amendment attack. To reach that result the majority focuses on the small amount of money involved and the asserted triviality of all of Rummel's offenses. But Rummel was not sentenced to life imprisonment for stealing $230.00; the life sentence resulted from his having committed three separate and distinct felonies under the laws of Texas. If the state is entitled to characterize a particular criminal act as a felony,[1] and to enforce its constitutional habitual criminal statute,[2] I cannot understand how these two constitutional statutes coalesce to produce an unconstitutional result. No neutral principle of adjudication[3] permits a federal court to hold

[1] The state's right to categorize an offense as a felony and to determine appropriate punishment in the first instance is beyond dispute. That this is so is demonstrated by the variety of statutory schemes relating to the type of offenses for which Rummel received habitual criminal treatment. Not only do some statutes retain the technical common law distinctions, *compare* Fla. Rev. Stat. Ann. § 812.021 (grand larceny statute) with Ga. Code Ann. 26-1803, et seq. (theft statutes), but the dollar amounts necessary to comprise a felony offense vary considerably. *See* Alabama Code Ann., Tit. 14, § 331 (Cum. Supp. 1973) (felony to take personal property worth more than $25.00); Fla. Rev. Stat. Ann. § 812.021 (felony to take property worth more than $100 or of an aggregate value of $200 in a twelve month period); Miss. Code Ann. § 97-17-41 (felony to take property worth more than $100). Thus I assume that Texas' right to impose a monetary boundary on felony offenses could not have been challenged by the petitioner. That Texas has since raised that limit is irrelevant. Prior law in this circuit so dictates. In *Capuchino v. Estelle*, 506 F.2d 440 (5 Cir. 1975), the petitioner was convicted of possession of narcotics paraphernalia. Two prior non-capital felonies were used for enhancement and he received a life sentence under the very statute the present petitioner challenges. In upholding the denial of habeas corpus, the panel specifically rejected the rationale of *Hart v. Coiner*, 483 F.2d 136 (4 Cir. 1973), cert. denied, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974), despite the fact that at the time of his habeas Capuchino could not have been convicted of more than a misdemeanor for which he could have served a year in jail.

[2] *Spencer v. Texas*, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). The majority concedes that the Texas statute is not unconstitutional but adopts an "unconstitutional-as-applied" approach to determine that in this instance the statute is invalid. The cases cited by the majority to support its approach are, however, inapposite to the issue in this case.

[3] The majority embraces the disproportionality rationale of *Hart v. Coiner*, *supra*, because it "applies objective criteria" to eighth amendment determinations. With due respect to my colleagues, I find no such objectivity in today's decision. The first of the four criteria requires a court inquiry into the "nature of the crime." The characterization of Rummel's crimes as minor property offenses is a subjective one based on the majority's decision that there simply was not enough money involved to permit the state to exact a life imprisonment. For many $200.00 is not an insignificant sum of money. To state that a crime is

that in a given situation individual crimes are too trivial in relation to the punishment imposed. I know of no stopping point for today's decision.

While it is well-settled that the eighth amendment circumscribes legislative power to punish crime,[4] the balance to be struck when a court enters this traditionally legislative field is not easily determined. The judicial function lies somewhere between abdication of fundamental responsibility in the guise of judicial restraint and the insertion of judicial conceptions of wisdom and propriety. *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 2741, 33 L.Ed.2d 346 (1972) (Brennan, J. concurring). To my mind, the majority has strayed too far in the latter direction.

In doing so, the majority depreciates the state's interest in protecting its citizens from the repetition of property crimes. Having found that Rummel was not "depraved," "heinous," or "incorrigible," the majority facilely submits that he does not pose such a threat to society to merit life imprisonment. In spite of an attempt to limit this case through an "unconstitutional-as-applied approach," the result of its conclusion will surely be an attack on the habitual offender statute in every instance of its attempted application to property crime. However, nothing in the court's

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one against property does not dispose of the difficulty involved in these cases. That difficulty is apparent in later Fourth Circuit decisions. Two years after *Hart* was written, its own author refused to apply it in *Griffin v. Warden, West Virginia State Penitentiary,* 517 F.2d 756 (4th Cir.), cert. denied, 423 U.S. 990, 96 S.Ct. 402, 46 L.Ed.2d 308 (1975). Griffin was charged with grand larceny. His two prior offenses were breaking and entering and burglary of a residence. The court stated:

> These and grand larceny are serious offenses that clearly involved the potentiality of violence and danger to life as well as property. Whether or not Griffin may be actually deserving of such extreme punishment is not within our province to decide; . . . .

See also Wood v. State of South Carolina, 483 F.2d 149 (4 Cir. 1973) (refusing to apply *Hart* to a five-year sentence for an obscene telephone call; defendant had prior convictions for larceny and auto theft).

The second prong of the *Hart* test, whether the penalty was necessary to accomplish the legislative purpose, is subject to the same criticism as the first. The last element, comparison of punishment of other offenses is limited by *Capuchino, supra.* This leaves only the third element that Texas' penalty is harsh in comparison with other states to support the majority opinion.

[4] *See Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910).

opinion informs state prosecutors, courts, or legislatures of the possible limits of error.

Moreover, today's decision signals a departure from longstanding precedent in this circuit. In *Rogers v. United States,* 304 F.2d 520 (5 Cir. 1962), the defendant was convicted of possession of a letter stolen from an authorized mail depository, forgery of a treasury check and the uttering of forgery with intent to defraud the United States. The treasury check underlying the offenses was for $380.51. None of Rogers' prior convictions involved violence. The panel affirmed his twenty-five-year sentence as within the statutory limit and found it unnecessary to pass on whether the sentence was within the eighth amendment standards.[5] In *Rener v. Beto,* 447 F.2d 20 (5 Cir. 1971), *cert. denied,* 405 U.S. 1051, 92 S.Ct. 1521, 31 L.Ed.2d 787 (1972), the court upheld a thirty-year sentence for the possession of a single marijuana cigarette with the following statement:

> This Circuit has long followed the principle that a sentence within the statutory limits set by a legislature is not to be considered cruel or unusual. (citations omitted). A sentence of thirty years is within the range of punishment prescribed by the Texas Penal Code for a second offense of possession of marijuana.

If the majority's analysis is correct, Rummel's case is indeed the "easy" one in which to apply it. Here the court faces an individual charged with what may seem to many to be insignificant offenses when the spotlight is on the amount of money involved. Surely the principle of decision cannot be the dollar sign, and the court gives no other indication where the line is to be drawn. Whatever sociological analysis I might apply to this case, I cannot avoid the conclusion that with this decision we stand on the brink of the "slippery slope" in its most classic sense. For that reason I cannot ad my voice to that of the majority and must respectfully—but firmly—DISSENT.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, MOR-

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[5] *See also Yeager v. Estelle,* 489 F.2d 276 (5 Cir.), *cert. denied,* 416 U.S. 908, 94 S.Ct. 1616, 40 L.Ed.2d 113 (1973). (Citing *Hart,* but refusing to overturn a "patently absurd" 500-year sentence for murder with malice.)

GAN, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

BY THE COURT:

A member of the Court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

IT IS ORDERED that the cause shall be reheard by the Court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT.

William James RUMMEL,
Petitioner-Appellant,

v.

W. J. ESTELLE, Jr., Director, Texas
Department of Corrections,
Respondent-Appellee.

No. 76–2946.

Dec. 20, 1978.

William James Rummel, pro se.

Scott J. Atlas (Court-appointed), Houston, Tex., for petitioner-appellant.

John L. Hill, Atty. Gen., Dunklin Sullivan, Asst. Atty. Gen., David M. Kendall, Jr., First Asst. Atty. Gen., Joe B. Dibrell, Gilbert J. Pena, Douglas M. Becker, Asst. Attys. Gen., Austin, Tex., for respondent-appellee.

Keith W. Burris, Asst. Crim. Dist. Atty., San Antonio, Tex., for Crim. Dist. Atty. of Bexar County, Tex., amicus curiae.

Michael Kuhn, Asst. Dist. Atty., Houston, Tex., for Dist. Atty. of Harris County, Tex., amicus curiae.

Harry J. Schulz, Jr., Asst. Dist. Atty., Dallas County, Tex., for Henry Wade, Crim. Dist. Atty., Dallas County, Tex., amicus curiae.

Appeal from the United States District Court for the Western District of Texas.

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges.

THORNBERRY, Circuit Judge:

This is a habeas corpus case in which the petitioner, William Rummel, challenges his life sentence under the

Texas habitual criminal statute[1] as cruel and unusual punishment in violation of the eighth amendment. A panel of this court held that his sentence violated the eighth amendment because his sentence was grossly disproportionate to his crimes. *Rummel v. Estelle,* 568 F.2d 1193 (5 Cir. 1978). The court has reheard this important case en banc and vacates the panel opinion.

I.

Facts

As stated by the panel opinion, the relevant facts are:

> In January 1973, a Texas grand jury indicted Rummel for the felony offense of obtaining $120.75 under false pretenses. The indictment also charged him with having two prior felony convictions: In 1964 he presented a credit card with the intent to defraud of approximately $80, and in 1969 he passed a forged instrument with a face value of $28.36. Rummel pled not guilty to the false pretense indictment, but a jury found him guilty as charged. After the state proved his two prior convictions, Rummel received an enhanced sentence of life imprisonment under the Texas habitual criminal statute then applicable, Tex. Penal Code Ann. art. 63 (Vernon 1925).[1] On appeal, the Texas Court of Criminal Appeals affirmed his conviction. *Rummel v. State,* 509 S.W.2d 630 (Tex.Cr.App.1974). Rummel applied for postconviction relief and raised in the Texas courts the issues now before us, but his application was denied without a hearing. Then Rummel sought habeas corpus relief in the federal district court, which also denied his petition without a hearing.

568 F.2d at 1195.

[1] Rummel was convicted under Tex. Penal Code Ann. art. 63 (Vernon 1925). This article provides:

> Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

With slight rewording, this provision is carried into the new Texas Penal Code. The provision is now found at Tex. Penal Code Ann. § 12.42(d) (Vernon 1974). The statute in various forms has been the law in Texas since 1856. *See* Tex. Laws 1856, Paschal, *Digest of Texas Laws,* art. 2464 (1866).

II.

As a preliminary matter, the State suggests that Rummel's petition is barred by *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), and the Texas "Contemporaneous Objection Rule" because Rummel failed to object to the mandatory life sentence at the punishment stage of his trial. In *Sykes,* the Court recognized the legitimate state interest inherent in a contemporaneous objection rule. *See St. John v. Estelle,* 563 F.2d 168 (5 Cir. 1977) (en banc). Since it is apparent that the Texas Court of Criminal Appeals has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute,[2] we are at a loss to see how any state interest would be served by demanding that Rummel make a futile gesture at his trial. Moreover, Texas apparently does not require a contemporaneous objection when a defendant challenges the constitutionality of the statute under which he was convicted. *Gann v. Keith,* 151 Tex. 626, 253 S.W.2d 413, 417 (1952).

III.

The Panel Opinion

The panel majority held that Rummel's life sentence under the Texas recidivist statute must be considered one for the entire term of Rummel's life, irrespective of any consideration of statutory good time. The majority reasoned that to consider good time credits would require the court to become involved in the parole process. 568 F.2d at 1196. Next, the court adopted the proportionality standards set out in *Sart v. Coiner,* 483 F.2d 136 (4 Cir. 1973), *cert. denied,* 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974). *Id.* Finally, the panel held that under these standards Rummel's life sentence violated the eighth amendment. *Id.* at 1200.

IV.

The initial question we must answer is: Does the eighth amendment prohibit some prison sentences for minor of-

[2] *Shaver v. State,* 496 S.W.2d 604 (Tex.Cr.App. 1974); *Rogers v. State,* 486 S.W.2d 786 (Tex.Cr.App. 1972); *Flores v. State,* 472 S.W.2d 146 (Tex.Cr. App. 1971); *Vandall v. State,* 438 S.W.2d 578 (Tex.Cr.App. 1969); *Ex Parte Reyes,* 383 S.W.2d 804 (Tex.Cr.App. 1964); *Mackie v. State,* 367 S.W.2d 697 (Tex.Cr.App. 1963); *Young v. State,* 170 Tex.Cr.R. 498, 341 S.W.2d 911 (1960); *Redding v. State,* 159 Tex.Cr.R. 535, 265 S.W.2d 811 (1954).

fenses solely because of their length? The State argues that this court is without power under the eighth amendment to review any prison sentence within the legislatively created maximum. And, to be sure, there is language in some of our opinions [3] and elsewhere [4] that supports this argument.

On the other hand, Rummel argues that an excessively long prison sentence for a trivial crime can be cruel and unusual punishment. Rummel, too, is aided by language in our opinions [5] and elsewhere.[6]

[3] *Salazar v. Estelle*, 547 F.2d 1226, 1227 (5 Cir. 1977) (semble); *Rener v. Beto*, 447 F.2d 20, 23 (5 Cir. 1971), *cert. denied*, 405 U.S. 1051, 92 S.Ct. 1521, 31 L.Ed.2d 787 (1972); *Castle v. United States*, 399 F.2d 642, 652 (5 Cir. 1968); *Ginsberg v. United States*, 96 F.2d 433, 437 (5 Cir. 1938).

[4] *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 565, 54 L.Ed. 793 (1910) (cases cited in dissenting opinion); *Downey v. Perini*, 518 F.2d 1288, 1292 (6 Cir. 1975) (dissenting opinion), *vacated on other grounds*, 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975); *United States v. Pruitt*, 341 F.2d 700, 703 (4 Cir. 1964); *Anthony v. United States*, 331 F.2d 687, 693–94 (9 Cir. 1964); *Smith v. United States*, 273 F.2d 462, 467–68 (10 Cir. 1959), *cert. denied*, 363 U.S. 846, 80 S.Ct. 1619, 4 L.Ed.2d 1729 (1960); *Edwards v. United States*, 206 F.2d 855, 857 (10 Cir. 1953); *United States v. Rosenberg*, 195 F.2d 583, 604 (2 Cir.), *cert. denied*, 344 U.S. 838, 73 S.Ct. 20, 97 L.Ed. 652 (1952); *United States v. Sorcey*, 151 F.2d 899, 902 (7 Cir. 1945), *cert. denied*, 327 U.S. 794, 66 S.Ct. 821, 90 L.Ed. 1021 (1946); *Gurera v. United States*, 40 F.2d 338, 340 (8 Cir. 1930); *Parker v. Bounds*, 329 F.Supp. 1400, 1402 (E.D.N.C. 1971); *Ormento v. United States*, 328 F.Supp. 246, 257 (S.D.N.Y. 1971); Cases cited in footnote 2, *supra*.

[5] *United States v. Bondurant*, 555 F.2d 1328, 1329 (5 Cir.), *cert. denied*, 434 U.S. 871, 98 S.Ct. 215, 54 L.Ed.2d 150 (1977); *United States v. Gamboa*, 543 F.2d 545, 548 (5 Cir. 1976); *United States v. Thevis*, 526 F.2d 989, 991 (5 Cir. 1976); *Bonner v. Henderson*, 517 F.2d 135, 136 (5 Cir. 1975); *Capuchino v. Estelle*, 506 F.2d 440, 442 (5 Cir. 1975); *United States v. Harbolt*, 455 F.2d 970 (5 Cir. 1972); *Yeager v. Estelle*, 489 F.2d 276 (5 Cir. 1973), *cert. denied*, 416 U.S. 908, 94 S.Ct. 1616, 40 L.Ed.2d 113 (1974); *United States v. Drotar*, 416 F.2d 914, 916 (5 Cir. 1969); *Rodriques v. United States*, 394 F.2d 825 (5 Cir. 1968); *Rogers v. United States*, 304 F.2d 520, 521 (5 Cir. 1962).

[6] *Moore v. Cowan*, 560 F.2d 1298, 1302 (6 Cir. 1977); *Roberts v. Collins*, 544 F.2d 168 (4 Cir. 1976); *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4 Cir. 1976); *Downey v. Perini*, 518 F.2d 1288 (6 Cir. 1975), *vacated on other grounds*, 423 U.S. 993, 96 S.Ct. 419, 46 L.Ed.2d 367 (1975); *Hart v. Coiner*, 483 F.2d 136 (4 Cir. 1973), *cert. denied*, 415 U.S. 983, 94 S.Ct. 1577, 39 L.Ed.2d 881 (1974); *Ralph v. Warden*, 438 F.2d 786 (4 Cir. 1970), *cert. denied*, 408 U.S. 942, 92 S.Ct. 2846, 33 L.Ed.2d 766 (1972); *Black v. United States*, 269 F.2d 38, 43 (9 Cir. 1959); *Hemans v. United States*, 163 F.2d 228, 237 (6 Cir.), *cert. denied*, 332 U.S. 801, 68 S.Ct. 100, 92 L.Ed. 380 (1947); *State v. Farrow*, 386 A.2d 808 (N.H. 1978); *State v. Freeman*, 223 Kan. 362, 574 P.2d 18, 27 (Mo. 1978) (en banc); *State v. Remmers*, 259 N.W.2d 779, 782 (Iowa 1977); *Stockton v. Leeke*, 237 S.E. 896, 897–98 (S.C. 1977); *State v. Calendine*, 233 S.E.2d 318, 330 (W.Va. 1977); *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236, 240 n.4 (1976) (en banc), *appeal dismissed*, 432 U.S. 901, 97 S.Ct. 2943, 53 L.Ed.2d 1074 (1977); *People v. Broadie*, 37 N.Y.2d 100, 371 N.Y.S.2d 471, 332 N.E.2d 338 (1975), *cert. denied*, 423 U.S. 950, 96 S.Ct. 372, 46 L.Ed.2d 287 (1975); *In Re Lynch*, 8 Cal.3d 410, 105 Cal.Rptr. 217, 503 P.2d 921 (1973); *People v. Lorentzen*, 387 Mich. 167, 194 N.W.2d 827 (1972); *Calhoun v. State*, 85 Tex. Cr.R. 496, 214 S.W. 335, 338 (1919) (semble); *McDonald v. Commonwealth*, 173 Mass. 322, 53 N.E. 874, 875 (1899); *State ex rel. Garvey v. Whitaker*, 48 La.Ann. 527, 19 So. 457 (1896) (semble); *State v. Driver*, 78 N.C. 423 (1878) (semble).

As has been frequently noted, the Supreme Court has never held a punishment unconstitutional because of length alone.[7] We do know, however, that each of the nine Supreme Court Justices, at least in death cases, has embraced the proportionality concept. *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1976) (White, Stewart, Blackmun, Stevens, JJ., plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (Stewart, Powell, Stevens, JJ., plurality opinion); *Furman v. Georgia*, 408 U.S. 238, 272 n.14, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring); *id.* at 458, 92 S.Ct. at 2838 (Burger, Powell, Blackmun, Rehnquist, JJ., dissenting opinion).

Were this a question of history alone, we must admit that we would have great difficulty in accepting the proportionality analysis, despite the efforts to demonstrate to the contrary. *See* Granucci, "Nor Cruel and Unusual Punishment Inflicted: The Original Meaning," 57 Calif.L.Rev. 839 (1969), Comment, "The Eighth Amendment, Beccaria, and the Enlightment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine," 24 Buffalo L.Rev. 783 (1975). We conclude, however, that as a result of jurisprudential development the eighth amendment's cruel and unusual punishment provision also prohibits unreasonable punishment, and a component of unreasonable punishment can be an excessive sentence for a trivial offense. As early as *Rogers v. United States*, 304 F.2d 520, 521 (5 Cir. 1962), the court recognized that a punishment could be cruel and unusual if "it is so greatly disproportionate to the offense committed as to be completely arbitrary and shocking to the sense of justice."

[7] Rummel's reliance on *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910), must be substantially discounted by the holding in *Badders v. United States*, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706 (1916). In *Badders*, the Court, per Holmes, J., summarily dismissed a proportionality attack on a five year sentence for mail fraud.

We do not wish to retreat from this rule and therefore we conclude that the eighth amendment does proscribe some punishments that are so disproportionate as to have no rational support. As the Second Circuit has recently said in *Carmona v. Ward,* 576 F.2d 405, 409 (2 Cir. 1978), *cert. denied,* — U.S. —, 99 S.Ct. —, 58 L.Ed.2d — (1979) "[W]e accept the proposition that in some extraordinary instance a severe sentence imposed for a minor offense could, solely because of its length, be a cruel and unusual punishment."

V.

Since we have concluded that some criminal sentences can be so disproportionate as to amount to cruel and unusual punishment, the question then becomes one of the proper standard to apply.

First, we hold that a punishment must be viewed as it occurs in the real world. We will consider the system as it actually works and we will not pass on academic possibilities. Second, we will at all times be mindful that it is the legislature that selects the range of punishments and it is our duty to uphold the legislature if there is any rational basis for so doing. We will remember that the petitioner challenging his sentence carries a heavy burden, *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 2926, 49 L.Ed.2d 859 (1976), and the petitioner does not discharge this burden merely by showing that he is treated more harshly than he would be treated in another state or by positing a more rational system than the one adopted by the legislature. Finally, we must remember that we can uphold a punishment as judges and disagree with that punishment as men.

Our ultimate disagreement with the panel opinion is not that it applied the *Hart v. Coiner* [8] standards, three of which

[8] Recently, the Fourth Circuit has apparently seen the difficulty in applying *Hart v. Coiner* to its fullest extent. In *Davis v. Davis,* 585 F.2d 1226 (1978), *reversing Davis v. Zahradnick,* 432 F.Supp. 444 (W.D. Va. 1977), the Fourth Circuit refused to overturn a forty year sentence for possessing and distributing approximately nine ounces of marijuana. The Fourth Circuit stated that the *Hart* inquiry was limited to cases in which a life sentence is imposed. *Id.* Interestingly, the Fourth Circuit relied on *Yeager v. Estelle,* 489 F.2d 276 (5 Cir. 1973), *cert. denied,* 416 U.S. 908, 94 S.Ct. 1616, 40 L.Ed.2d 113 (1974). In *Yeager,* we upheld a 500 year sentence for murder with malice. Considering Texas law, we are unable to distinguish between Yeager's 500 year sentence and Rummel's life sentence. Therefore, we will not follow the Fourth Circuit's lead and limit our inquiry to life cases. In Texas, a life sentence has essentially the same effect as one for sixty years. Certainly, the inquiry must be the same in both cases.

we adopt today, but from its failure to uphold a sentence if there is any rational basis for so doing.

VI.

A. *The Texas Habitual Criminal Law*

Recidivist statutes have been upheld many times against a variety of challenges.[9] The starting point of our analysis is that Article 63 is constitutional. In *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 651, 17 L.Ed.2d 606 (1967), the Court said:

> . . . No claim is made here that recidivist statutes are themselves unconstitutional, nor could there be under our cases. Such statutes and other enhanced-sentence laws . . . have been enacted in all the States, and by the Federal Government as well. . . . Such statutes, though not in the precise procedural circumstances here involved, have been sustained in this Court on several occasions against contentions that they violate constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities. [Citations omitted.]

Article 63 provides:

> Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.

Texas strictly construes this provision. Before one can be sentenced under the enhanced penalty provision, the State must prove that each succeeding conviction was subsequent to both the commission of and conviction for the preceding offense. *Tyra v. State,* 534 S.W.2d 695, 698 (Tex. Cr.App.1976). Moreover, the defendant must actually have gone to prison before the State can use the previous conviction for enhancement, *Cromeans v. State,* 160 Tex.Cr.R.

[9] *Oyler v. Boles,* 368 U.S. 448, 82 S.Ct. 501, 7 L.Ed.2d 446 (1961); *Gryger v. Burke,* 334 U.S. 728, 732, 68 S.Ct. 1256, 92 L.Ed. 1683 (1948); *Graham v. West Virginia,* 224 U.S. 616, 623 (1912); *McDonald v. Massachusetts,* 180 U.S. 311, 312, 21 S.Ct. 389, 45 L.Ed. 542 (1901); *Moore v. Missouri,* 159 U.S. 673, 677, 16 S.Ct. 179, 40 L.Ed. 301 (1895); *Wilson v. Slayton,* 470 F.2d 986 (4 Cir. 1972); *Wessling v. Bennett,* 410 F.2d 205 (7 Cir. 1969); *Price v. Allgood,* 369 F.2d 376 (5 Cir. 1966), *cert. denied,* 386 U.S. 998, 87 S.Ct. 1321, 18 L.Ed.2d 349 (1967); *see generally,* Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L.Rev. 99 (1971).

135, 268 S.W.2d 133, 135 (1954), and no conviction can be used for enhancement more than one time when establishing the habitual criminal status, *Carvajal v. State*, 529 S.W.2d 517, 521 (Tex.Cr.App.1975), *cert. denied*, 424 U.S. 926, 96 S.Ct. 1139, 47 L.Ed.2d 336 (1976); *Ex Parte Montgomery*, 571 S.W.2d 182, 183 (Tex.Cr.App.1978).

In practice the following events must happen before Article 63 is ever called into question:

(1) A defendant must be convicted of a felony [10] and must be sent to prison.

(2) After the defendant has been convicted of the first felony, he must be convicted of a second felony. Again, the defendant must be given a prison term.

(3) After the defendant has been convicted of the second felony and sent to prison for the second time, the defendant must be convicted of a third felony.

Most American jurisdictions do not interpret their recidivist statutes as strictly as Texas.[11] According to Note, "Don't Steal a Turkey in Arkansas—The Second Felony Offender in New York," 45 Fordham L.Rev. 76, 78–79 (1976):

> Other states require that the defendant have been previously convicted, sentenced and "placed on probation, paroled, fined *or* imprisoned. . . ." [12] Florida demands a "formal adjudication of guilt," . . . . In other jurisdictions, a verdict or a plea of guilty is all that is necessary to implement added sanctions.[13] Other opinions indicate that simultaneous, multiple convictions may be used for the purpose of applying recidivist statutes.[14] [footnotes renumbered]

[10] This section is new, however. If the felony is a third degree felony, the trial judge has the discretion under present Texas law to reduce the offense to a first degree misdemeanor. Tex. Penal Code Ann. § 12.44 (Vernon 1974).

[11] Iowa's interpretation is similar to the Texas view:

> Our statute dictates that each offense must have been complete as to conviction, sentence and commitment to prison before the commission of the next in order that it qualify for application of the enlarged punishment of [Iowa's habitual offender statute].

State v. Tillman, 228 N.W.2d 38, 41 (Iowa 1975).

[12] *State v. Abernathy*, 515 S.W.2d 812, 814 (Mo.Ct.App. 1974) (emphasis added). Accord, *Lis v. State*, 327 A.2d 746, 748 (Del.Supr. 1974).

[13] E. g., *Woods v. Mills*, 503 S.W.2d 706 (Ky.Ct.App. 1974).

[14] E. g., *Cox v. State*, 255 Ark. 204, 499 S.W.2d 630 (1973); *State v. Williams*, 226 La. 862, 77 So.2d 515 (1955).

B. *Texas Good Time Credit*

The panel majority held that it could not consider good time credits. This holding is inconsistent with at least two other Fifth Circuit cases. *Brown v. Wainwright*, 574 F.2d 200, 201 (5 Cir. 1978) substituted opinion 576, 1148 (1978); *Rodriguez v. Estelle*, 536 F.2d 1096, 1097 (5 Cir. 1976).

The majority of the court sitting en banc has determined that *Brown* and *Rodriguez* establish the better rule for several reasons. First, *Brown* and *Rodriguez* are consistent with our view that the court is to look at the system realistically. To ignore the Texas good time system is to close our eyes to reality. Second, to assume Rummel's sentence is one for life absolutely is to import a sentence unknown to Texas law.[15] Third, we cannot assume, even though good time credits are not vested rights, that Texas will act arbitrarily, capriciously and unconstitutionally in administering its good time scheme. Fourth, we note that reasoned authority in other jurisdictions consider the parole probability in reviewing sentences under the eighth amendment. In *Carmona v. Ward, supra* at 413–414, the Second Circuit stated:

> We cannot agree that the recognized probability of parole in the cases before us was to be ignored when the court determined whether the statutory punishment was unconstitutional as applied to appellees. On the one hand, we are asked to look at all the circumstances which would ameliorate the seriousness of petitioners' offenses and their individual culpability in order to justify a finding that their punishment was constitutionally offensive. On the other hand, we are asked in effect to consider the appellees so incorrigible that they must be deemed destined to durance vile for the rest of their natural lives because they will never be paroled. We do not consider this to be a realistic or practical approach. See 61 Calif.L.Rev. 418, 422 (1973).
>
> We are told that the New York Parole Board is stringent, that it lacks standards and that its determinations are beyond the jurisdiction of the federal court. The suggestion that the federal court act as a New York parole board determining which prisoner should be released and

[15] According to the respondent, only five states—Alabama, Arizona, Delaware, Georgia, and Tennessee—provide for a life sentence without possibility of parole.

under what conditions is not at all palatable as a practical matter, *Wolfish v. Levi,* 573 F.2d 118, 120 (2d Cir. 1978), to say nothing of the offense to the principles of comity and federalism. Cf. *Rizzo v. Goode,* 423 U.S. 362, 378–81, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). This court has properly reviewed cases where state prisoners have alleged denial of due process rights or other constitutional imperfections in parole procedures.[14] There is no reason to anticipate that either the petitioners here will be denied a constitutionally proper parole hearing or that the federal courts will hesitate to intervene if their constitutional rights are violated in the state proceedings. We conclude that in determining the severity of the sentences imposed here we cannot consider them equivalent to life sentences without parole.[15] Rather we must view the punishment as set forth by the statute which provides that the defendants here are eligible for parole, as are all other felons in the state, at the conclusion of their mandatory minimum sentences.

In Texas, a prisoner is eligible for parole after receiving credit for twenty years' imprisonment or after serving one third of his sentence, whichever is less. Tex.Code Crim. Pro.Ann. art. 42.12 § 15(a) (Vernon 1974). Since Rummel is serving a life sentence, he is eligible for parole after accruing credit for twenty years. Texas employs a well-developed system of awarding good time credits. Class I prisoners earn twenty days "good time" per month. Class II prisoners earn ten days "good time" per month, Tex.Civ.St. Ann. art. 61841 (Vernon 1974), and State-approved trusties earn thirty days credit for each thirty days service. Tex. Penal Code Ann. art. 61841 (Vernon 1974). Thus, a State-approved trusty can serve a life sentence in ten years.[16]

The State of Texas argues that its "good time" system is the most liberal in the country. Were we to judge this assertion, we would require more study, however, the State has provided us with a compendium of each state's good time credit system, and it appears that the Texas system compares favorably with most jurisdictions.[17] This, we are told, is not an accident nor an example of Texas' munificence, but

[16] Indeed, Rummel has informed this court that he has been a State-approved trusty since March 1, 1977.

[17] We have attached an appendix of various jurisdiction's good time provisions.

a part of a very definite plan. As a popular journal has stated:

> Although the prisoners are not permitted by Texas law to earn money for their work, the prison does pay them in time. State Approved Trusties (SAT)—half the inmate population—draw two-for-one good time. Every month they serve puts two months in their time accounts; a man with ten remaining years who is made an SAT serves those ten years in five calendar years. Good time earned also brings parole-eligibility dates closer. The men in the Line are in one of three grades. Lines II and III are disicplinary: Line II draws forty days for every thirty days served, and Line III draws day for day. Everyone else, even men just arriving at the Diagnostic Unit in Huntsville in custody of their county sheriffs, is Line I, which draws fifty days for every thirty served.
>
> Texas has the most liberal good-time laws in the country, which is curious since Texas also gives the longest sentences and is the most reluctant to grant parole.
>
> . . . . .
>
> The good-time grades are particularly important at Ellis, where there are so many men doing heavy time and so few who have much chance of being paroled. A change in grade from SAT to Line III doubles the years ahead to be served. Men with trusty jobs are very careful.
>
> George Beto, Estelle's predecessor as TDC director and now on the faculty in the criminal justice program at Sam Houston State University, used to tell visitors that the administration of good time and the presence of the Line kept inmates working hard in school programs and behaving properly on other jobs.

Jackson, *Hard Times,* Texas Monthly, December 1978, 138 at 258.

Considering Texas' good time system, the inevitable conclusion is that Rummel can be eligible for parole at the end of twelve calendar years, or considering his trusty status, even earlier.

VII.

Both the panel majority and *Hart* looked to the nature of the crime in determining whether a particular legislatively

selected punishment offended the eighth amendment's proportionality element. The en banc majority agrees that looking to the nature of the offense is an inexorable part of proportionality analysis.

Our disagreement with the panel majority is, however, that it failed to apply the first principle of our analysis—that every inference is to be made in favor of the selected punishment and that it erred by looking to the underlying offenses to establish the asserted triviality of the offenses. We adopt the dissent's reasoning that "Rummel was not sentenced to life imprisonment for stealing $230.00; the life sentence resulted from his having committed three separate and distinct felonies under the laws of Texas." *Rummel v. Estelle*, 568 F.2d 1193, 1201 (5 Cir. 1978) (dissenting opinion). As put another way by the Second Circuit:

> The recidivists' statutes which provide for longer sentences for repeat offenders present an example of a penalty created by the legislature because of considerations other than the specifics of the final underlying crime.

Carmona v. Ward, 576 F.2d at 411 n.9.

Rummel asserts that all of his offenses were "nuisance offenses"; if we were to judge this statement, we doubt that we could so blandly characterize his behavior. Manifestly, however, Rummel has demonstrated by his past behavior that he is unable to conform himself to the rules of society. Texas has justifiably found Rummel to be a habitual criminal and has imprisoned him for this reason.

It is beyond peradventure that Texas intends to punish Rummel with at least a ten year sentence. And this does not violate the eighth amendment.[18] Beyond that, the burden is on Rummel to prove by his good behavior and diligent work that he is entitled to a place in free society.[19]

VIII.

The panel majority argued that comparison of Rummel's sentence with the sentences imposed in other jurisdictions

[18] *See Davis v. Davis*, 585 F.2d 1226 (4 Cir. 1978); *Wood v. South Carolina*, 483 F.2d 149 (4 Cir. 1973).

[19] Rummel suggests that even if he is paroled, he is still on probation and lifetime probation is in itself cruel and unusual punishment. This argument need not detain us long. We cannot understand how a lifetime requirement of good behavior is too much to ask of a habitual criminal.

confirms the gross disproportionality of Rummel's sentence. 568 F.2d at 1199.

We believe that the evidence on this point is, at best, inconclusive. Of course, if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the majority's assertion is probably accurate. However, we have rejected this approach and have held that the likely probability of Rummel's jail term should be compared with the experience of other states. This Rummel has not done, and our research suggests that Rummel's actual jail time would not be significantly longer in Texas than his jail time in many other states.

The record in this case reveals that Rummel was convicted of a fourth felony on the same day he was sentenced under Texas habitual offender statute. Three states[20] punish a three time offender with a mandatory life sentence, and three states[21] provide for a discretionary life sentence for a three time offender. Three states[22] punish a four time offender with a mandatory life sentence, and eight states[23] provide for a discretionary life sentence for a four time offender. Given these facts, it appears that up to a possible six states would sentence Rummel to a life term and up to eleven states would give discretion to the court to determine Rummel's sentence.

On the face of the record before us, we feel confident that few if any of the eleven discretionary states would sentence Rummel to the maximum discretionary life term. However, it is most important to remember that the record we have before us was developed under the particularly peculiar Texas system, and since we do not have occasion to examine the full extent of Rummel's record,[24] we cannot in complete confidence hold that no one of the discretionary states would

[20] Texas Penal Code art. 12.42(d) (Vernon 1974); Wash. Rev. Code § 9.92.090 (perhaps limited by *State v. Lee*, 87 Wash.2d 932, 558 P.2d 236, 240 n.4 (1976) (en banc); W.Va. Code § 61-11-18 (limited by *Hart*).

[21] Ark. Stat. Ann. § 14-1001; Idaho Code § 19-2514; Kan. Crim. Code & Code of Crim. Proc. § 21-4504.

[22] Colo. Rev. Stat. § 16-13-101; N.M. Stat. Ann. § 40A-29-5; Wyo. Stat. § 6-1.

[23] Alaska Stat. § 12.55.050; La. Rev. Stat. Ann. § 15-529.1; Mich. Comp. Laws § 28.1084, M.C.L.A. § 769.12; Nev. Rev. Stat. § 207.010; N.J. Stat. Ann. § 2A:85-12; N.C. Gen. Stat. § 14-7.1, 7.6; S.D. Compiled Laws Ann. § 22-7-1; Vt. Stat. Ann. tit. 13, § 11.

[24] Nor do we have occasion to examine the discretion of the prosecutor in bringing the enhanced indictment. *But cf. Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 671-72, 54 L.Ed.2d 604 (Powell, J., dissenting).

sentence Rummel to a life sentence or a sentence that is essentially equal to the one Rummel is serving.

Finally, Rummel has made no attempt to demonstrate what the actual jail times in the various jurisdictions would amount to.[25] An example will illustrate our point. Suppose that State A gives a ten year sentence for theft and State B gives a thirty year sentence for the same theft. State A has a practice of fixed and determinate sentence and does not award early release based on good time or discretionary parole. State B, however, is similar to Texas and through long experience is can be shown that the thirty year sentence amounts to about ten years' imprisonment. Can it justifiably be said that State B punishes the theft three times more severely than State A? This court thinks not.

A variation of this very possibility might be found in our own circuit. In Georgia, upon conviction of the fourth felony, the defendant receives the mandatory maximum without parole.[26] Ga.Code Ann. § 27–2511. Rummel's equivalent offense in Georgia is theft by deception, Ga.Code Ann. § 26–1803, and the maximum penalty is ten years, Ga.Code Ann. § 26–1812. Considering the no parole provision, Rummel's imprisonment in Georgia would be approximately the same as his imprisonment in Texas.

IX.

The panel majority held that a "[C]omparison of Rummel's sentence with the punishment accorded other crimes under Texas law" highlighted the irrational severity of Rummel's punishment. 568 F.2d at 1199. The majority compared Rummel's underlying crimes with the various Texas penalties selected for a single act. This comparison is inappropriate in this case. If this challenge were to a sentence for one act of theft, then the comparison between the sentence given for the theft and the sentence given for murder or rape would be appropriate. But this is not the case, Rummel's sentence resulted from his status as a habitual criminal.

[25] Of course, this detailed comparison of actual practices was not required in *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 2867, 53 L.Ed.2d 982 (1977), for obvious reasons.

[26] We cannot know definitely if the Georgia enhancement provision would apply to Rummel, but we nevertheless supply this example because there is nothing on the face of the Georgia statute that suggests to us that Georgia would not apply its enhancement statute to Rummel. We wish to underscore the difficulty of comparing the various enhancement statutes to each other.

X.

Finally, the panel majority adopted from *Hart* a test that "seeks to determine whether a *significantly* less severe punishment could achieve the purposes for which the challenged punishment is inflicted." 568 F.2d at 1198 *citing Hart*, 483 F.2d at 141. We reject that test as a part of the appropriate proportionality analysis.

This test was taken from Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. 238, 300, 92 S.Ct. 2726, 2757–2758, 33 L.Ed.2d 346 (1972). Mr. Justice Brennan's opinion stated a "lack of necessity" test or a "less drastic means" test: "Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment."[27]

This test has never commanded a majority in the Supreme Court, even in death cases. And the very circuit that has given us *Hart* declared, in *Hall v. McKenzie*, 537 F.2d 1232, 1235 (4 Cir. 1976), that death "occupies a special place in eighth amendment jurisprudence."

We believe that this passage from Wheeler, "Toward a Theory of Limited Punishment II: *The Eighth Amendment After Furman v. Georgia*," 25 Stanford L.Rev. 62, 77–78, succinctly expresses our reasons for not adopting the *Hart* "lack of necessity" test.

> The Brennan-Marshall necessity test is even more impractical in other eighth amendment adjudication, where the empirical data and long usage associated with capital punishment are absent. If a convict were to challenge the length of his prison sentence or the length of the statutory maximum as being unnecessary to deter potential criminals from committing the same crime he committed, I am convinced that the government could never show that 10 years' imprisonment deters more effectively than 5 years' imprisonment or that one year in jail deters more effec-

[27] Mr. Justice White expressed a similar sentiment, 408 U.S. 238, 311, 92 S.Ct. 2726, 2763, 33 L.Ed.2d 346, and, Mr. Justice Marshall *id.* at 331, 92 S.Ct. at 2773.

tively than a $500 fine. The problem would be even more substantial for a new punishment. If the government attempted to employ a new punishment, it would be impossible to adduce empirical data proving its necessity for deterrence purposes. Thus, if the purpose of the punishment was to increase deterrence, it would be unconstitutional because its necessity was unproved.

XI.

Perhaps, the Texas habitual offender law and the Texas scheme that has developed under the law is not in accord with notions of modern penology,[28] but our task is not to prod the State into adopting the latest theory of penal reform. The science of penology is an imprecise one that offers us few sure answers. The Supreme Court has said this many times but the best statement is from *Gore v. United States,*

> In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, The History of English Criminal Law: The Movement for Reform, 1750–1833, *passim*, these are peculiarly questions of legislative policy.

357 U.S. 386, 78 S.Ct. 1280, 1285, 2 L.Ed.2d 1405.

The legislature in our society selects the punishment scheme and we are justified to strike down the legislature's choice only when the petitioner demonstrates that the legislative choice has no rational basis and is totally and utterly rejected in modern thought. So long as there is room for debate, the choice of the legislature will not be overturned. Rummel places great reliance on the fact that all of his crimes were nonviolent. If a state were to limit its recidivist statute to only those who have been convicted of violent crimes,[29] the state would have made a rational choice

[28] *See e. g.*, Katkin, Habitual Offender Laws: A Reconsideration, 21 Buffalo L. Rev. 99 (1971); Furgeson, The Law of Recidivism in Texas, 13 McGill Law Journal 663, 665 (1967); Note, The Treatment of the Habitual Offender, 7 U. Richmond L. Rev. 525 (1973).

[29] Moreover, this is to totally ignore the difficulty in determining the line between crimes that are violent or have a potential for violence or present a strong social interest. While we have not carefully surveyed the Texas Penal Code, it appears that there are approximately forty-five third degree felonies. In combinations of three, this yields 45,190 possibilities, and sooner or later, this court could expect to see many of them.

Finally, by what authority does Rummel denegrate the interest society has in punishing his crimes? Certainly, Rummel's victims see the important social interest in deterring his behavior. Would there be a greater social interest if Rummel were to have stolen $2,300, $23,000, or $230,000 rather than the $230 he actually stole? Is it less serious to steal $230 from an elderly widow than to steal $2,300,000 from the First National Bank?

and perhaps a more rational choice than it has made in Article 63. But Rummel cannot gain any advantage by positing a more rational system than the one in existence: He must demonstrate that the system in existence is an irrational one.

After three felony convictions and two ineffectual prison terms, the State of Texas has chosen to place the burden on the offender to prove his entitlement to a place in society. This is not an irrational choice, and to many, one that is not particularly callous. We do not think that Texas has adopted a system that is cruel and unusual in violation of the eighth amendment, even as applied to William Rummel.

XII.

Rummel also alleges that his trial counsel was ineffective at his state trial. The panel did not reach this issue, and we deem the issue unworthy for en banc treatment in the first instance. We therefore remand this issue to the panel for its decision on this matter.

XIII.

We affirm the district court's denial of habeas corpus relief on the eighth amendment issue. We remand the sixth amendment issue to the panel for its original consideration.

AFFIRMED in part; REMANDED to the panel in part.

Appendix to follow.

APPENDIX

According to the State, the following are selected examples of various jurisdiction's good time provisions.

I State	II Law First Passed	III Rate of Good Time Allowances	IV Types of Additional Good Time Allowances	V Rate of Additional Good Time Allowances	VI Offender Ineligible for Good Time	VII Effect on Parole Eligibility	VIII Effect on Discharge and/or Release
Ala.	1843	6mo–1 yr 5days/mo 1–3 yr 6days/mo 3–5 yr 7days/mo 5–10 yr 8days/mo Remaining 10days/mo	Meritorious Industrial Production Blood Donation	1st yr 3days/mo 2nd, 3rd, 4th yr 4days/mo 5th+yr 5days/mo 30 days/yr	Life Murder 1st	No effect	Credited to maximum sentence to advance discharge
Cal.	Repealed 1948	None					
D.C.	1901	1mo–1yr 5days/mo 1–3 yr 6days/mo 3–5 yr 7days/mo 5–10 yr 8days/mo 10th 10days/mo Remaining 10days/mo	Blood Donation Meritorious conduct, volunteer programs, industrial	30 days/yr Lump sum or 1st yr 3days/mo 2nd+yr 5days/mo	Life	No effect	Credited to maximum sentence to advance conditional release
Fla.	1871	1st yr 5days/mo 2nd yr 5days/mo 3rd yr 10days/mo 4th yr 10days/mo 5th yr 15days/mo Remaining 15days/mo	Extra gain time Special gain time Special gain time	1–6 days/mo 1–15 days/mo 1–60 days flat reduction	All eligible	No effect	Credited to maximum sentence to advance conditional release

APPENDIX—Continued

According to the State, the following are selected examples of various jurisdiction's good time provisions.

I State	II Law First Passed	III Rate of Good Time Allowances	IV Types of Additional Good Time Allowances	V Rate of Additional Good Time Allowances	VI Offender Ineligible for Good Time	VII Effect on Parole Eligibility	VIII Effect on Discharge and/or Release
Ga.	1856	1st yr 1mo/yr 2nd yr 2mo/yr 3–10 yr 3mo/yr Remaining 4mo/yr	Exemplary conduct	Set by board of corrections	Life	No effect	Credited to minimum sentence to advance conditional release
La.	1842	25days/mo flat	None		Life	No effect	Credited to maximum sentence to advance discharge
Miss.	1892	1st yr 3days/mo 2nd yr 4days/mo 3rd yr 5days/mo 4th yr 6days/mo 5th yr 7days/mo 6th yr 8days/mo 7th yr 9days/mo 8th yr 10days/mo 9th yr 11days/mo 10th yr 15days/mo Remaining 15days/mo	Extra meritorious conduct Overtime or Sunday work Blood Donation	Increase allowances Equivalent allowances 10 days	All eligible	No effect	Credited to maximum sentence to advance discharge
N.Y.	1817	Rate determined by good time allowance committee not to exceed 1/3 of the maximum on an indeterminate sentence	Meritorious conduct, extra work	Rate determined by commissioner of corrections	Life	No effect	Credited to maximum sentence to advance conditional release

APPENDIX—Continued

According to the State, the following are selected examples of various jurisdiction's good time provisions.

I State	II Law First Passed	III Rate of Good Time Allowances	IV Types of Additional Good Time Allowances	V Rate of Additional Good Time Allowances	VI Offender Ineligible for Good Time	VII Effect on Parole Eligibility	VIII Effect on Discharge and/or Release
Texas	1931	Class I 20days/mo Class II 10days/mo Class III None	Trusty Blood Donation	30 days/mo 30 days	All eligible	Credited to maximum sentence to advance parole eligibility	Credited to maximum sentence to advance discharge
W.Va.	1868	1 yr 5days/mo 1–3 yrs 6days/mo 3–5 yrs 7days/mo 5–10 yrs 8days/mo Remaining 10days/mo	Meritorious conduct	9¾ days/mo	Life	No effect	Credited to maximum sentence to advance discharge
Federal	1867	6mo–1yr 5days/mo 1–3 yrs 6days/mo 3–5 yrs 7days/mo 6–10 yrs 8days/mo Remaining 10days/mo	Camp good time, Work release good time, Community Treatment Center good time, Industrial good time, Meritorious good time, special award good time, Good time earned at other state institutions: military, state, D.C.	1st yr 5days/mo 2nd and Remaining 5days/mo	All eligible	No effect	Credited to maximum sentence to advance conditional release

CHARLES CLARK, Circuit Judge, with whom GOLDBERG, GODBOLD, JAMES C. HILL, ALVIN B. RUBIN and VANCE, Circuit Judges, join, dissenting:

In Part VIII the majority concedes that "if the court is forced to assume that Rummel's sentence is automatically and invariably one for his natural life, then the [assertion that the sentence is grossly disproportionate to Rummel's crimes] is probably accurate." Nevertheless, the court decides that Rummel's life sentence is not in fact a life sentence because of Texas' good time credit system and the possibility of parole. The court reasons that it should not be concerned with "academic possibilities" but with the "real world."

But what is real and what is academic? The State of Texas has sentenced William Rummel to spend the rest of his life in the penitentiary. If parole ever comes, it comes at the sheer grace of the State. In Rummel's real world, it is not the possibility that Texas will grant him parole that governs his future. Rather, it is the existing order requiring that he be held in custody until he dies. The eighth amendment either bars affixing the sentence for Rummel's crimes or it does not. If Rummel has a constitutional right to interdict his prison term, this court must declare that right's existence without regard to the possibility that Texas, by an act of executive grace, may grant him parole.

A.

At the outset it is important to note that the critical factor in determining how to regard Rummel's life sentence is not the Texas system for awarding good time credit but the Texas system for granting parole. The majority refers to the good time credit system and parole interchangeably, and it relies to a large extent on the relative liberality of the Texas good time credit system. The two systems embody totally different concepts, however, and they have special meanings in the context of a life sentence. Good time credit results in the early release of a prisoner under a sentence to a fixed term of years. For example, one serving a twenty-year sentence may be released after only ten years actual jail time if he has accumulated ten years of good time credit. A person committed for life, however, cannot have his prison term reduced by good time credit. Because the length of

his sentence is fixed by the span of his life, there is no fixed term from which his credit can be subtracted. No amount of accumulated good time credit entitles a man serving a life sentence to a release from prison because of credit accumulated.

The only chance for release such a life sentence prisoner has is parole. Texas law specifically provides that parole is not considered a reduction in sentence, Tex. Code Crim. Pro.Ann. art 42.12 § 22 (Vernon Supp. 1966–1977); the sentence remains in effect during its entire period even if parole is granted. *Ex parte Lefors,* 165 Tex.Cr.R. 51, 303 S.W.2d 394 (1957). Unlike good time credit, which is an enforceable statutory entitlement subject to constitutional due process protection, *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) parole is a matter of executive grace which constitutional due process does not protect. *See* part B, *infra.*

Even under the court's own premise that it should measure probabilities rather than legally enforceable rights, however, the court's juxtaposition of Texas' good time credit system with its parole system tends both to confuse and to understate Rummel's plight. Although it is true that Texas' good time credit system may benefit Rummel by causing his eligibility for parole consideration to come earlier than may be the case in other jurisdictions, Rummel's chances for parole once he becomes eligible are by no means better than they would be in other places. According to the authority quoted in the majority opinion, "Texas . . . gives the longest sentences and is the most reluctant to grant parole." *Supra* p. 658.

Ultimately, however, the constitutional issue should not turn on how good Rummel's chances for parole consideration may be, but on the fact that they are only chances.

B.

A convict is deemed to have been constitutionally deprived of all right to liberty for the length of his sentence, subject only to whatever legal entitlements he may have under state or federal law. *Meachum v. Fano,* 427 U.S. 215, 96 S.Ct. 2532, 2538, 49 L.Ed.2d 451 (1976); *Montanye v. Haymes,* 427 U.S. 236, 96 S.Ct. 2543, 49 L.Ed.2d 466 (1976). The possibility of parole is not such an entitlement because it has no legal effect on the right of Texas to confine Rummel.

"Parole is an act of grace of the sovereign," *Clifford v. Beto,* 464 F.2d 1191, 1195 (5th Cir. 1972), that "cannot be demanded as a right." *Jay v. Boyd,* 351 U.S. 345, 76 S.Ct. 919, 924–25, 100 L.Ed. 1242 (1956); *Escoe v. Zerbst,* 295 U.S. 490, 55 S.Ct. 818, 819, 79 L.Ed. 1566 (1935). Historically, parole in the United States evolved from the practice of the King of England to grant conditional pardons, C. Newman, Sourcebook on Probation, Parole and Pardons 18–19 (3d ed. 1972). In Texas, parole is still classified as a conditional pardon. *Ex parte Lefors,* 165 Tex.Cr.R. 51, 303 S.W.2d 394 (1957); *Clifford v. Beto,* 464 F.2d 1191, 1194 (5th Cir. 1972).

Since parole is totally an act of grace by the state, there is no legal basis for judicial intervention in the merits of parole decisions. The Due Process clause of the Constitution only applies to property interests or liberty interests that are established "entitlements." *E. g., Board of Regents v. Roth,* 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann,* 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Paul v. Davis,* 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Bishop v. Wood,* 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976). This court has repeatedly emphasized that Texas prisoners do not have any entitlement in the nature of a liberty or property interest in their expectancy of release on parole. *Johnson v. Wells,* 566 F.2d 1016, 1018 (5th Cir. 1978); *Craft v. Texas Board of Pardons and Paroles,* 550 F.2d 1054 (5th Cir. 1977). We have frequently distinguished the mere hope of being granted parole from the limited liberty interest that accrues after parole has been granted by steadfastly refusing to extend the minimal due process protection applicable to parole revocation to the initial determination by parole boards on whether to grant parole. *Shaw v. Briscoe,* 541 F.2d 489 (5th Cir. 1976); *Cook v. Whiteside,* 505 F.2d 32 (5th Cir. 1974); *Clifford v. Beto,* 464 F.2d 1191, 1196 (5th Cir. 1972). Thus, we have refused to equate "the *possibility* of conditional freedom with the *right* to conditional freedom." *Scarpa v. United States Board of Parole,* 477 F.2d 278 (5th Cir.), *vacated for consideration of mootness,* 414 U.S. 809, 94 S.Ct. 79, 38 L.Ed.2d 44 (1973), *dismissed as moot,* 501 F.2d 992 (1973). The most thorough statement of this position is in *Brown v. Lundgren,* 528 F.2d 1050, 1052–1053 (5th Cir. 1976):

> At the constitutional level, there is a clear distinction between the loss of a statutory privilege once obtained

and the denial of that same privilege, never given. While the threatened loss of a privilege may be "grievous" and therefore require some degree of procedural due process protection, *see, e. g., Morrissey v. Brewer,* 1972, 408 U.S. 471, 482, 92 S.Ct. 2593, 33 L.Ed.2d 484, the denial of that privilege may only be subject to the procedural demands of the particular enabling statute. Thus, while parole revocation and prison discipline are clearly within the ambit of the Due Process Clause of the Fifth and Fourteenth Amendments, the mere expectation of parole release while still in otherwise lawful custody is not so vested as to result in a "grievous loss" if denied by the parole board. . . .

In any context where it is asserted that constitutional due process is required, the basic, threshold question is whether there is a "grievous loss" of either a liberty or property interest. If there is no such loss, then the second question of whether the particular challenged procedure comports with fundamental fairness is never reached. In short, we find that the denial of parole as distinguished from the revocation of parole as in *Morrissey,* supra, is not a "grievous loss," and we therefore do not consider whether the procedures of the parole board deny constitutional due process.

Other circuits have taken the same position as *Brown.* The Ninth Circuit has stated:

> The legally convicted prisoner has no vested right to determination of his sentence at less than maximum, nor to parole. . . . No rigid or even measurable criteria dictate that a particular individual must have his sentence set at less than the maximum term. These same principles apply to the granting of paroles.

Dorado v. Kerr, 454 F.2d 892, 897–98 (9th Cir. 1972). The Second Circuit has said that the prisoner seeking parole "neither enjoys freedom from prison walls nor is entitled to it." *Walker v. Oswald,* 449 F.2d 481, 485 (2nd Cir. 1971). In *Menechino v. Oswald,* 430 F.2d 403, 408–409 (2nd Cir. 1970), that Circuit reasoned that a prisoner seeking parole was like an alien seeking entry into the United States.

As a matter of law, Rummel's sentence deprives him of all right to liberty for the rest of his life.[1] To treat Rummel's sentence as one to serve less than life is, analytically,

no different from treating a death sentence as imposing a milder punishment because of the possibility of an executive pardon. *Carmona v. Ward,* 576 F.2d 405, 420 (2nd Cir. 1978) (Oakes, J., dissenting). Rummel's future chance for parole has no legal significance, it is merely a statistical possibility of clemency, an unenforceable hope that he may someday benefit from the grace of a parole board.[2] The eighth amendment demands that Rummel's claim be judged by the law of rights and duties, not the law of probabilities.

C.

Not only is Rummel's sentence not legally ameliorated by the possibility of parole, but his actual chances of being paroled have little to do with the crime for which he was sentenced. They largely depend on his *subsequent* behavior in prison. If he ever does gain parole, his *subsequent* behavior outside of prison, even if non-criminal, may result in revocation and return to prison forever. Tex. Code Crim. Pro.Ann. art. 42.12 § 22. (Vernon Supp. 1978).

Texas repeatedly emphasizes that Rummel has a good chance of parole eligibility in 10 to 12 years, implying by its protestations that 10 to 12 years would adequately serve the

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[1] The cases cited on this issue in our own circuit as well as the Ninth and Second Circuits clearly rely on the classic right-privilege distinction, a distinction that has drawn scholarly and judicial attack. *See, e.g., Morrissey v. Brewer,* 408 U.S. 471, 482, 92 S.Ct. 2593, 2601, 33 L.Ed.2d 484 (1972); *Goldberg v. Kelly,* 397 U.S. 254, 262 and n.8, 90 S.Ct. 1011, 1017, 25 L.Ed.2d 287 (1970); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968). However, the Supreme Court's more recent pronouncements in the due process area, *Roth, Sindermann,* and *Bishop, supra,* clearly require the existence of a legal entitlement to a property or liberty interest before the due process clause applies. The entitlement doctrine is in fact the right-privilege distinction resurrected in new verbal garb. *See generally* Note, *Democratic Due Process: Administrative Procedure After Bishop v. Wood,* 1977 Duke L.J. 453. Whatever the hope of release on parole may be labeled, under the cases cited in the text, it definitely does not rise to the level of a "right" or an "entitlement" and it definitely confers no legally protectable interest on the prisoner.

[2] The California Supreme Court in *In re Lynch,* 8 Cal.3d 410, 419, 105 Cal. Rptr. 217, 223, 503 P.2d 921, 926 (1972), held that a life sentence with parole had to be treated as a life sentence for the purposes of eighth amendment analysis. One of the factors relied on by the court was the fact that the penological function of parole is only to mitigate a punishment which would otherwise be deserving. 105 Cal.Rptr. at 217, 503 P.2d at 921. The holding in *Lynch* was followed by New York in *People v. Broadie,* 37 N.Y.2d 100, 110, 371 N.Y.S.2d 471, 474, 332 N.E.2d 338, 341 (1975).

state's penological interests. The majority's intimation that Rummel's case is an attractive one for relatively early parole also suggests that insofar as Rummel's punishment is considered in connection with his crimes alone, a life sentence would be disproportionate. Indeed, the court concedes that if it considered his sentence one for life, it would be grossly disproportionate. It relies on Rummel's chances for something less. The state's equation then, is that if Rummel's three crimes do not in themselves justify life imprisonment, three crimes plus subsequent bad behavior in prison would.

It is almost certain to the state that if Rummel does serve the rest of his natural life in jail, it will not be for the crimes for which his sentence was imposed, but rather for other reasons. These reasons the world may never know. No public record need show which of an infinite number of reasons caused Rummel to fall into disfavor with the parole board. He may by laziness or insolence make enemies of prison authorities. His personality may cause trouble with other prisoners. Many forms of behavior which bring discipline in prison are not criminal in the outside world. Rummel has no recourse if the parole board in its virtually unfettered discretion is never moved to release him or tell him why it did not.[3]

Parole, if it does come, is in no way equivalent to the freedom of an ordinary citizen. The conditions imposed on the parolee are wide-ranging, and any violation may result in a return to prison. The Supreme Court described typical parole restrictions in *Morrissey v. Brewer, supra,* 92 S.Ct. at 2598–99:

> Typically, parolees are forbidden to use liquor or to have associations or correspondence with certain categories of undesirable persons. Typically, also they must seek permission from their parole officers before engaging in specified activities, such as changing employment or living quarters, marrying, acquiring or operating a motor vehicle, traveling outside the community, and incurring substantial indebtedness. Additionally, parolees must regularly report to the parole officer to whom they are assigned and sometimes they must make periodic written reports of their activities.

[3] The substantive standard applied by the board is "the best interest of society," Tex. Code Crim. Pr. Ann. art. 42.12 § 22. The situation is not novel. In 1637, the annals of the General Court of the Massachusetts Bay Colony record the following dialogue in the Banishment of Anne Hutchinson:

> "Ms. Hutchinson: I desire to know wherefore I am banished.
> "Gov. Winthrup: Say no more. The court knows wherefore and it is satisfied."

There is no way for this court to predict whether, in the event that he is paroled, Rummel will run afoul of some parole restrictions which again would not constitute criminal behavior. In *Morrissey* the Court stated that it is estimated that 35–45 percent of all parolees are returned to prison for parole violations. 92 S.Ct. at 2599, *citing* President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Corrections 62 (1967). Rummel will have to toe any line the parole board may draw during his time in prison to have any chance at parole, and he will have to continue to toe its line for the rest of his life to maintain any limited freedom he may gain as a parolee. Rummel has no right to pay a constitutional penalty for his crimes and be done with them. *See Weems v. United States,* 217 U.S. 349, 366–67, 30 S.Ct. 544, 54 L.Ed. 793 (1909).

A person who receives a twelve-year sentence for a crime in Texas and is totally recalcitrant in his behavior while in prison can do no worse than serve his whole twelve years. The parole board may choose not to let him out early, but it cannot make him stay longer than the term of his sentence. What that person may do after his term is served, so long as it is not criminal, is his own business. If Rummel's offenses, standing alone, only justify a maximum sentence to a term of years, then he should be able to serve those years and be done with them, no matter what the parole board thinks of him. But that is not Rummel's condition. Texas has deprived Rummel of any legally enforceable right to his freedom for his entire life and the chances for grace are perilous and without protection of law.

The Constitution says that his sentence should not stand if lifetime deprivation of freedom is grossly disproportionate to his crimes.

D.

Although the Supreme Court has never dealt with the proper construction of a sentence with a chance of parole for the purposes of the eighth amendment, the Court has

treated the problem in reviewing sentences under the *ex post facto* clause. U. S. Const. art. I, § 10. In *Lindsey v. State of Washington,* 301 U.S. 397, 57 S.Ct. 797, 81 L.Ed. 1182 (1937), the Court reviewed a conviction from the State of Washington. At the time the petitioner, Lindsey, had committed his crime of larceny, the law provided for the sentence to be fixed by the trial judge at a minimum of 6 months and a maximum of 15 years. Parole was authorized in the discretion of the parole board at any point prior to the expiration of the sentence received. At the time Lindsey was sentenced, however, the law had been changed to a scheme similar to the present Texas system. A mandatory 15-year sentence was provided. At the same time, however, the statute provided that "a convicted person may be released on parole by the board after he has served the period of confinement fixed by the board, less time credits for good behavior and diligence." 301 U.S. at 399, 57 S.Ct. at 798. The Supreme Court held that in determining the constitutionality of the sentence the contingent possibility of parole was irrelevant; the constitutionality of the sentence had to be measured by the mandatory statutory maximum of 15 years:

> The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen-year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or canceled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed.

301 U.S. at 400–401, 57 S.Ct. at 798–99. The Supreme Court went on to acknowledge the difference between a release from prison after a number of years at the end of a sentence and release from prison after the same number of years on parole:

> Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from confinement and tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year term.

Id. at 401, 57 S.Ct. at 799. The continued vitality of the *Lindsey* holding was confirmed in the Supreme Court's recent opinion in *Dobbert v. Florida,* 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), in which the Court said with reference to *Lindsey*:

> Even though under the new statute a convict could be admitted to parole at a time far short of the expiration of his mandatory sentence, the Court observed that even on parole he would remain "subject to the surveillance" of the parole board and that his parole itself was subject to revocation.

97 S.Ct. at 2301. Although *Lindsey* and *Dobbert* were decided under the *ex post facto* clause and not the eighth amendment, their reasoning is fully applicable to Rummel's case.

E.

When the petitioner's punishment is correctly characterized as a life sentence, its excessiveness is striking even with the greatest deference to the state's legitimate interests in punishing recidivism. My views on the unconstitutional disproportionality of the sentence were set forth in the original panel opinion:

> The legislative objective of punishing recidivists certainly is legitimate. However, in view of the dramatically lower minimum penalties that Texas imposes upon defendants who commit even the most violent crimes short of capital murder and even upon defendants with a second conviction and a prior offense involving violent second-degree felonies, it clearly appears that a significantly less severe penalty would fulfill the legislative objectives of protecting citizens and deterring crime. The recent reclassification of Rummel's third offense as a misde-

meanor under Texas law buttresses this view. That at most two other states and perhaps none would require life imprisonment for a defendant in Rummel's circumstances confirms the constitutional disproportionality of the sentence given Rummel.

Rummel v. Estelle, 568 F.2d 1193, 1200 (5th Cir. 1978).

The sentence which Texas imposed is society's judgment and, if upheld, society has every legal right to enforce it. If Texas chooses to make good the threat which the sentence itself imposes, no court may be a refuge for Rummel. We may speculate as to Rummel's likely fate, but these guesses are without constitutional significance. "The threat makes the punishment obnoxious." *Trop v. Dulles,* 356 U.S. 86, 102, 78 S.Ct. 590, 599, 2 L.Ed.2d 630, 643 (1957).

It is true that Rummel's severe sentence arises not merely from the inherent nature of his crimes but from the fact that his felonies were three in number. It is equally true that Texas may treat recidivists more harshly than other offenders and that the Texas statute on its face is constitutional. *Spencer v. Texas,* 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). But Rummel is not Spencer. Nor is the constitutionality of Texas' imposition of life imprisonment on Spencer a determination that life imprisonment can constitutionally be imposed on Rummel. Recidivism is no talisman that justifies life imprisonment for any three felonies without regard to their underlying seriousness.

William Rummel is now sentenced to life imprisonment because, in addition to a 1973 conviction for obtaining $120.75 by false pretences, he had previously been convicted in 1969 for passing a forged check for $28.36 and in 1964 for credit card fraud involving $80.00. Even when enhanced by the fact that Rummel repeated his petty cheating conduct three times over a period of nine years, the action of the State of Texas in ordering him imprisoned until he dies is so shockingly disproportionate to his offenses that I am obliged to respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 76-2946

WILLIAM JAMES RUMMEL,
Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director,
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING
(March 9, 1979)

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN and VANCE, Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

CHIEF JUDGE

* Judge Thornberry was a judge in regular active service on the en banc court when the decision in this cause was rendered. Subsequently Judge Thornberry took Senior Status. On October 20, 1978 the Omnibus Judgeship Bill, Public Law 95-486 (95th Congress) was approved. Judge Thornberry did not participate in this decision.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 76-2946

D. C. DOCKET NO. SA-76-CA-20

WILLIAM JAMES RUMMEL,
Petitioner-Appellant,

versus

W. J. ESTELLE, JR., Director, Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas

Before BROWN, Chief Judge, THORNBERRY, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, and VANCE, Circuit Judges.

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on respondent-appellee's petition for rehearing en banc and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court en banc that the District Court's denial of habeas corpus relief on the eighth amendment issue in this cause be, and the same is hereby affirmed. The sixth amendment issued is remanded to the panel for its original consideration;

December 20, 1978

Clark, Circuit Judge, dissenting, with whom Goldberg, Godbold, Hill, Rubin and Vance, Circuit Judges, join.

Issued As Mandate: MAR 19 1979

SUPREME COURT OF THE UNITED STATES

No. 78-6386

William James Rummel,
Petitioner,

v.

W. J. Estelle, Jr., Director, Texas
Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Fifth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 21, 1979

☆ U.S. Government Printing Office: 1979—297-170/35